Supreme Court, U.S.
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No. _-___

IN THE

Supreme Court of the United States

CORAL POWER, L.L.C., ET AL.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. BILL LOCKYER, ATTORNEY GENERAL, ET AL.,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission has the power to order retroactive refunds under § 205 of the Federal Power Act, 16 U.S.C. § 824d, for sales made under a tariff that the Commission accepted for filing without suspension or hearing.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Coral Power, L.L.C., AES Placerita, Inc., Portland General Electric Company, Powerex Corp., PPL EnergyPlus, LLC, PPL Montana, LLC, Public Service Company of New Mexico, Puget Sound Energy, Inc., Sempra Energy Solutions LLC (f/k/a Sempra Energy Solutions), Sempra Energy Trading Corp., and Sempra Generation (f/k/a Sempra Energy Resources) were intervenors in the court of appeals proceedings and participated in the agency proceedings.

Respondent People of the State of California ex rel. Bill Lockyer, Attorney General, was the petitioner in the court of appeals proceedings and participated in the agency proceedings.

Respondent Federal Energy Regulatory Commission was the respondent in the court of appeals proceedings.

The following respondents were intervenors in the court of appeals proceedings and participated in the agency proceedings:

AES Delano, Inc. (f/k/a Delano Energy Company Inc.)
Arizona Public Service Co.
Avista Corporation
Avista Energy, Inc.
BP Energy Co.
Cabrillo Power I LLC
Cabrillo Power II LLC
California Public Utilities Commission
City of Tacoma, Washington
Duke Energy North America, LLC
Duke Energy Trading and Marketing, LLC
Dynegy Power Marketing, Inc.
El Paso Merchant Energy LP
El Segundo Power LLC
Enron Energy Services, Inc.

Enron Power Marketing, Inc.
Long Beach Generation LLC
Mirant Americas Energy Marketing LP
Mirant California, LLC
Mirant Delta, LLC
Mirant Potrero, LLC
Morgan Stanley Capital Group Inc.
Mountainview Power Company
Pacificorp
Pacificorp Power Marketing, Inc.
Pinnacle West Capital Corporation
Public Service Company of Colorado
Reliant Energy Services, Inc.
Riverside Canal Power Company
Strategic Energy LLC
TransCanada Energy Ltd.
Williams Energy Marketing & Trading Company

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Coral Power, L.L.C., AES Placerita, Inc., Portland General Electric Company, Powerex Corp., PPL EnergyPlus, LLC, PPL Montana, LLC, Public Service Company of New Mexico, Puget Sound Energy, Inc., Sempra Energy Solutions LLC, Sempra Energy Trading Corp., and Sempra Generation state the following:

Coral Power, L.L.C. is owned by Coral Energy Holding, L.P., which is owned by Shell Oil Company. Shell Oil Company is owned indirectly by Royal Dutch Petroleum Company, which in turn is owned by Royal Dutch Shell plc, a publicly traded corporation. Royal Dutch Shell plc has no parent company, and no publicly held company owns 10% or more of its stock.

AES Placerita, Inc. is a wholly owned subsidiary of The AES Corporation. AES Placerita, Inc. has its principal offices in Newhall, California. The AES Corporation is a publicly traded Delaware corporation with its principal executive offices located in Arlington, Virginia. The AES Corporation has no parent company, but approximately 16% of its stock is owned by Legg Mason Capital Management, Inc. ("LMCM"). LMCM is not a publicly traded company, but it is wholly owned by Legg Mason Inc. ("LMI"), which is a publicly traded company. LMI has no parent company, and no publicly held company owns 10% or more of its stock.

Portland General Electric Company is a publicly traded company. Pursuant to a federal bankruptcy court plan of distribution, a Reserve for Disputed Claims owns a large percentage of Portland General's common stock. The Reserve for Disputed Claims is not a publicly traded entity.

Powerex Corp. is a Canadian corporation incorporated under British Columbia's Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

PPL EnergyPlus, LLC and **PPL Montana, LLC** are wholly owned, indirect subsidiaries of PPL Corporation, whose shares are publicly traded. PPL Corporation has no parent company, and no other publicly held company has a 10% or greater ownership interest in PPL EnergyPlus, LLC, PPL Montana, LLC, or PPL Corporation.

Public Service Company of New Mexico ("PNM") is a corporation organized and existing under the laws of the State of New Mexico, and is engaged primarily in the generation, transmission, distribution, and sale of electricity and in the transmission, distribution, and sale of natural gas within the State of New Mexico. PNM is a wholly owned subsidiary of PNM Resources, Inc. ("PNM Resources"), which is a corporation organized and existing under the laws of the State of New Mexico. PNM Resources is a publicly traded company and has issued securities to the public. Other than PNM Resources, PNM has one affiliate, Texas-New Mexico Power Company, that has issued shares or debt securities to the public.

Puget Sound Energy, Inc. is a Washington corporation having its principal place of business at PSE-12N, 10885 NE 4th St., Bellevue, Washington 98004-5591. Puget's mailing address is PSE-12N, P.O. Box 97034, Bellevue, Washington 98009-9734. Puget is an investor-owned public utility primarily engaged in the business of purchasing, generating, transmitting, distributing, and selling electric energy at wholesale and retail. Puget is a wholly owned subsidiary of Puget Energy, Inc., a holding company. Puget Energy, Inc. has issued equity or debt securities to the public.

Sempra Energy Solutions LLC and **Sempra Generation**: Both Sempra Energy Solutions LLC ("SES") and Sempra Generation are indirect wholly owned subsidiaries of Sempra Energy, a publicly held corporation. No other publicly held company has a 10% or greater ownership interest in each of Sempra Generation, SES, or

Sempra Energy. Sempra Generation acquires, develops, and operates power plants and energy infrastructure, and markets at wholesale the output from power plants, for the competitive market. SES is a retail provider of natural gas and electricity to commercial and industrial customers throughout the United States in markets that offer retail choice.

Sempra Energy Trading Corp. ("SET") is a corporation organized and existing under the laws of the State of Delaware. Its principal office is located at 58 Commerce Road, Stamford, Connecticut 06902. SET is a full-service energy trading company that markets and trades physical and financial energy and metals products, including electric energy and power, natural gas, crude oil, base metals, and associated commodities. SET is a wholly owned indirect subsidiary of Sempra Energy, whose shares are publicly traded. No other publicly held company has a 10% or greater ownership interest in SET or Sempra Energy.

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Coral Power, L.L.C., AES Placerita, Inc., Portland General Electric Company, Powerex Corp., PPL EnergyPlus, LLC, PPL Montana, LLC, Public Service Company of New Mexico, Puget Sound Energy, Inc., Sempra Energy Solutions LLC, Sempra Energy Trading Corp., and Sempra Generation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This petition raises an issue of surpassing importance to a core sector of our nation's economy: whether the Federal Energy Regulatory Commission ("FERC" or "Commission") has the power to order retroactive refunds for sales of wholesale electricity in a circumstance not expressly authorized by Congress in the Federal Power Act ("FPA" or "Act"). In a sweeping and unprecedented opinion that departs from a line of decisions by the D.C. Circuit and makes no effort to engage the statutory text, the Ninth Circuit took FERC to task for adhering to its seven-decade-old view that Congress in the FPA afforded the agency only very limited authority to impose retroactive refunds. The underlying premise of the Ninth Circuit's decision is that the FPA provides a retrospective remedy in every case. That erroneous conclusion disregards the FPA's text, its legislative history, this Court's decisions, and the decisions of other circuits. It is also bad policy.

The Ninth Circuit's decision in this case violates the plain language of the FPA. Only two provisions of the Act explicitly grant FERC any retroactive refund authority, and both provisions are by their plain terms inapplicable here. Moreover, the FPA's legislative history confirms that Congress did not intend to empower FERC with the kind of retroactive refund remedy created by the Ninth Circuit. In several cases, this Court has recognized FERC's lack of authority to order retroactive refunds and has applied the filed rate doctrine to bar litigants' attempts to unsettle past wholesale electricity transactions.

Under the FPA's plain text and this Court's cases articulating and applying the filed rate doctrine, the D.C. Circuit and other federal courts of appeals have held that FERC cannot order refunds for past sales of wholesale electricity, except in the narrow circumstances permitted by the FPA. The Ninth Circuit's decision in this case cannot be reconciled with those decisions, which the court below completely ignored.

The Ninth Circuit conferred on FERC an atextual refund authority in a lead case arising out of the California energy crisis of 2000-2001, in which shortages of electricity coupled with extraordinarily hot weather combined to produce severe market conditions and high prices. Its decision threatens to unsettle completely the market for power both looking backward and in the future. Retrospectively, many sellers of electricity in the California markets during the 2000-2001 period also purchased power at market prices, so the court's atextual remedy has a deleterious effect on those market participants by forcing a recalculation of thousands of closed and settled transactions – destroying significant contractual reliance interests. Looking forward, the court's judgment creates massive disincentives to capital investment in the Western power markets because the possibility that FERC will impose retroactive refunds not contemplated by Congress presents an enormous, unanticipated, and uncertain risk for power sellers. That decision destroys the longstanding balance – enacted by Congress in the 1930s and repeatedly ratified by Congress, this Court, and the D.C. Circuit – between correcting unjust-and-unreasonable prices on a prospective basis (thereby preserving incentives to invest) and ordering refunds on sales that took place before FERC determined the rate to be unjust and unreasonable.

The outcome of this case unquestionably would have been different had it been decided by the D.C. Circuit under precedents properly construing the FPA and applying this Court's precedents. Hundreds of cases arising out of the California energy crisis will be decided under the erroneous standard articulated by the Ninth Circuit in this case, and the court's decision creates extraordinarily counterproductive market incentives. The petition should be granted and the decision below reversed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 383 F.3d 1006. The order of FERC denying California's complaint (Pet. App. 20a-60a) is reported at 99 FERC ¶ 61,247. FERC's order denying rehearing (Pet. App. 61a-79a) is reported at 100 FERC ¶ 61,295.

JURISDICTION

The court of appeals entered its judgment on September 9, 2004, and rehearing was denied on July 31, 2006 (Pet. App. 80a-81a). On October 23, 2006, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including December 28, 2006. *Id.* at 96a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Power Act, 16 U.S.C. §§ 791a *et seq.*, and the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, are set forth at Pet. App. 82a-95a.

STATEMENT OF THE CASE

Statutory Framework

In 1935, Congress enacted the FPA,[1] which delegated to FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982); *see* 16 U.S.C. § 824. This petition involves the proper interpretation of § 205 and § 206 of that Act.

Section 205 defines FERC's authority over wholesale electricity and transmission rates. Section 205(a) of the FPA requires that "[a]ll rates . . . made, demanded, or received" by sellers of wholesale electricity be "just and reasonable," and it declares "any . . . rate . . . that is not just and reasonable" to be "unlawful." 16 U.S.C. § 824d(a). Section 205(b) prohibits discriminatory pricing. *See id.* § 824d(b). Section 205(c) requires sellers to file, "[u]nder such rules and regulations as [FERC] may prescribe" and "within such time and in such form as [FERC] may designate," "schedules" (also known as "tariffs"[2]) that contain "all rates" for any sale of wholesale electricity in interstate commerce. *Id.* § 824d(c). Section 205(d) requires utilities to provide FERC with notice of any proposed change in rates. *See id.* § 824d(d). Section 205(e) grants FERC authority to investigate the lawfulness of any proposed rate change; permits FERC to suspend the effectiveness of proposed rates pending administrative review; and, when the proposed rate takes effect after a period of suspension but before the conclusion of FERC's investigation, authorizes FERC to order refunds for sales occurring during its review. *See id.* § 824d(e). *See generally City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.) (under § 205, FERC plays a "reactive role").

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[1] Title II of the Public Utility Act of 1935, ch. 687, 49 Stat. 803, 838-63 (codified as amended at 16 U.S.C. §§ 791a-825r).

Under § 206(a), FERC has the power to investigate, on complaint or its own motion, the lawfulness of any existing approved rate. *See* 16 U.S.C. § 824e(a). Section 206(b) permits FERC to order refunds when it determines that an existing rate is unjust, unreasonable, or unduly discriminatory. Refunds, however, cannot be ordered for transactions occurring before "the date of the filing of [a] complaint" or "the date of the publication by [FERC] of notice of its intention to initiate" an investigation under § 206. *Id.* § 824e(b).

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[2] FERC's regulations define the term "rate schedule" as "a statement of (1) electric service . . . , (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, regulations or contracts which in any manner affect or relate to the aforementioned service, rates, and charges." 18 C.F.R. § 35.2(b). That statement must "be in writing and may take the physical form of a contractual document, purchase or sale agreement, lease of facilities, *tariff* or other writing." *Id.* (emphasis added; footnote omitted). "Tariff" means "a compilation, in book form, of rate schedules of a particular public utility, effective under the Federal Power Act, and a copy of each form of service agreement." *Id.* n.1. The remainder of this petition uses the more common term "tariff" instead of "schedule."

Market-Based Rate Tariffs

Historically, electric utilities charged fixed wholesale rates, which were based on the cost of providing service plus a reasonable rate of return.[3] In the early 1970s, FERC started allowing sellers to file tariffs containing formula rates, which specified the cost components of the rate; under those tariffs, rates changed as costs fluctuated. *See Public Utils. Comm'n v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001). Later, FERC began approving tariffs under which rates would be set in the market. *See, e.g., Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 (1989). As FERC has explained, "[m]arket-based rates helped to develop competitive bulk power markets." *Promoting Wholesale Competition*, 61 Fed. Reg. at 21,545.

When reviewing a utility's application for authority to sell at market-based rates, FERC requires the applicant to "establish that it, and its affiliates, either do not have, or have adequately mitigated, market power" in both the generation and the transmission of electric energy. *Grand Council of Crees v. FERC*, 198 F.3d 950, 953 (D.C. Cir. 2000). FERC's aim is to assess "whether the seller or its affiliates [can] limit competition and thereby drive up prices," and a "key inquiry [is] whether the seller or its affiliates own[] or control[] transmission facilities in the relevant service area and therefore, by denying access or imposing discriminatory terms or conditions on transmission service, [can] foreclose other generators from competing." *Promoting Wholesale Competition*, 61 Fed. Reg. at

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[3] *See Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 758 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2957 (2005). *See generally* Final Rule, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,543-46 (1996) ("*Promoting Wholesale Competition*") (recounting the historical development of the electric energy industry).

21,546.[4] The seller "must also establish that it cannot erect barriers to entry, and that there is no evidence of other behavior perceived as anticompetitive." *Grand Council of Crees*, 198 F.3d at 953.

FERC provides public notice of the seller's application and an opportunity for interested parties to file comments. When FERC approves a seller's application, it issues an order, of which aggrieved parties can obtain judicial review. *See, e.g., Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 366-69 (D.C. Cir. 1998). FERC's determination that a seller lacks market power – a determination that must be made before the seller can conduct *any* transactions at market-based rates – establishes that market discipline will assure that the seller's rates are just and reasonable.[5]

During the period at issue in this petition, FERC's orders granting authority to sell at market-based rates generally required the applicants to submit periodic reports containing information on their market power and their transactions in the market. *See* Pet. App. 10a-11a.[6] Quarterly transaction reports included, among other things, information on participants in the transactions, the type of power sold, and the price at which that power was sold. *See id.* at 48a-49a. FERC used that information to reassess its conclusion that the seller lacked, or had mitigated, market power.[7] FERC also could investigate, under FPA § 206, whether a seller's market-based rates had become unjust and unreasonable. If so, then FERC could order modifications to the seller's tariff (including revoking the seller's market-based rate authority) and require a seller to pay refunds, subject to the limitations of § 206. *See id.* at 44a-45a.

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[4] *See also AEP Power Mktg., Inc.*, 107 FERC ¶ 61,018 (2004) (setting forth FERC's current market-power tests), *clarified on denial of reh'g*, 108 FERC ¶ 61,026 (2004); *Citizens Power & Light*, 48 FERC ¶ 61,210, at 61,777 (defining market power as a seller's ability to "significantly influence price in the market by withholding service and excluding competitors for a significant period of time").

[5] *See Louisiana Energy*, 141 F.3d at 365 ("Where there is a competitive market, [FERC] may rely on market-based rates in lieu of cost-of-service regulation to ensure that rates satisfy [§ 205(a)'s just-and-reasonable-rate] requirement."); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (same); Pet. App. 43a ("[B]efore a utility can charge market-based rates, [FERC] must find the utility (and its affiliates) lacks or has mitigated market power. That determination supports a conclusion that resulting market-based rates, through market discipline, will be just and reasonable."); *see also Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment.").

California's Wholesale Electricity Market

In the mid-1990s, retail electricity rates in California were nearly twice the national average and rising.[8] In response, California comprehensively reformed its electric energy industry, moving from a cost-based rate system to a more market-based rate system.[9] To effect that reform, the California Public Utilities Commission ("CPUC") issued an order[10] and the California Legislature unanimously passed a bill[11] that, together, restructured the California electricity market. Among other changes, the State created several auction markets for trading wholesale electricity.[12]

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[6] For an example of FERC's reporting requirements, see *Citizens Power & Light*, 48 FERC ¶ 61,210, at 61,778; *see also British Columbia Power Exchange Corp.*, 80 FERC ¶ 61,343, at 62,141 (1997) (requiring Powerex to file quarterly reports on its transactions and an analysis of its market power triennially). After the events at issue in this petition, FERC expanded and clarified its reporting requirements. *See* Final Rule, *Revised Public Utility Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107 (2002).

[7] *See* Pet. App. 44a ("The filings give notice of the actual prices that were charged and allow monitoring to assure that conditions have not changed so as to permit the exercise of market power, and therefore that market rates will no longer be in the zone of reasonableness.").

[8] *See* W. Lynn Garner, *California Rides the Tiger*, Public Utilities Fortnightly, Jan. 1, 1995, at 20.

[9] *See Snohomish*, 384 F.3d at 758-59; *Pacific Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1035 (N.D. Cal. 2002).

[10] *Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation*, D. 95-12-063, 1995 Cal.

Initially, those markets performed well. *See* Pet. App. 45a n.40. Then, in 2000 and 2001, prices in those markets increased significantly. FERC has identified three "principal causes" of the price increases experienced in California: "First, a lack of electricity supply in California. As a result, California imported more power from other Western states tha[n] would otherwise be the case. Second, poor market rules, particularly rules that governed the behavior of state regulated utilities in California. Third, market manipulation."[13]

The events that took place in California's wholesale electricity markets during 2000 and 2001 have spawned numerous regulatory and judicial proceedings, many of which are ongoing.[14] For example, FERC has mandated

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PUC LEXIS 1034 (CPUC Dec. 20, 1995), *modified by* D. 96-01-009, 1996 Cal. PUC LEXIS 22 (CPUC Jan. 10, 1996).

[11] Act of Sept. 23, 1996, 1996 Cal. Legis. Serv. 854 (A.B. 1890) (West) (codified at Cal. Pub. Util. Code §§ 330-397 (West 1998)).

[12] *See, e.g.*, *Snohomish*, 384 F.3d at 759 (describing those markets); *see also* Pet. App. 2a-3a & n.2 (recounting significant aspects of the restructuring plan).

[13] Federal Energy Regulatory Commission, Open Commission Meeting Statement of Chairman Joseph T. Kelliher (Sept. 21, 2006); *see San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,121, at 61,353-55 (2000) (identifying the same three factors); *see also* Paul L. Joskow, *California's Electricity Crisis*, 17 Oxford Rev. Econ. Pol'y 365, 377 (2001) (identifying "five primary *interdependent* factors: (i) rising natural gas prices, (ii) a large increase in electricity demand in California, (iii) reduced imports from other states, (iv) rising prices for nitrogen oxide (NOx) emissions credits, and (v) market-power problems").

[14] *See, e.g.*, *Public Utils. Comm'n v. FERC*, 462 F.3d 1027, 1036-45 (9th Cir. 2006) ("*PUC v. FERC*") (recounting California's transition to competitive electricity markets and describing many of the administrative proceedings and litigation arising out of that transition); FERC, Report to the United States Congress, *The Commission's Response to*

structural reforms of California's energy markets and has issued rules proscribing manipulative market behavior.[15] FERC is also in the process of adjudicating a complex investigation to determine the extent to which sellers of energy will be ordered to pay refunds for sales at prices exceeding just-and-reasonable rates.[16] Petitions for review of many FERC orders arising from the events of 2000 and 2001 have been or are being considered by the same panel of the Ninth Circuit that decided this appeal.

FERC also has investigated allegations of market manipulation by sellers.[17] Many of those investigations have been resolved without any finding of wrongdoing.[18]

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the California Electricity Crisis and Timeline for Distribution of Refunds 20-26 (Dec. 27, 2005) ("FERC 2005 Report").

[15] *See* Final Rule, *Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 114 FERC ¶ 61,163 (2006); Final Rule, *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (2006); FERC 2005 Report at 4 & n.5, 8.

[16] *See PUC v. FERC*, 462 F.3d 1027 (9th Cir. 2006) (addressing issues arising from that proceeding).

[17] *See* Order Directing Staff Investigation, *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002); Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior, *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003); Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior Through the Use of Partnerships, Alliances or Other Arrangements and Directing Submission of Information, *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003); *see also* Order on Motion for Discovery Order, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 101 FERC ¶ 61,186, at 61,733 (2002) (responding to an order of the Ninth Circuit by permitting private parties "to conduct discovery into market manipulation by various sellers during the western power crisis of 2000 and 2001").

[18] *See, e.g.*, Order on Motion to Dismiss Show Cause Proceeding, *Public Serv. Co. of New Mexico*, 112 FERC ¶ 61,033 (2005); Order Approving Contested Settlement, *Coral Power, L.L.C.*, 108 FERC ¶ 61,115 (2004); Order Approving Contested Settlement Agreement, *Powerex Corp.*, 106 FERC ¶ 61,304 (2004); Order Approving Contested Settlement Agreement, *Puget Sound Energy, Inc.*, 106 FERC ¶ 61,026 (2004); Order on Motions to Dismiss Show Cause Proceedings, *Arizona Pub. Serv. Co.*, 106 FERC ¶ 61,021, at 61,077, 61,080 (2004) (Public Service Company of New Mexico). FERC has extended the statutory

Indeed, a FERC economist testified that "Powerex was genuinely attempting to assist [with] congestion management" and that the "evidence demonstrate[d] Powerex's reliability as a supplier and its contribution toward keeping the lights on in California during the crisis."[19] In addition, FERC ordered some sellers to demonstrate that they did not violate the federal tariffs that governed California's markets when they submitted bids to sell energy into those markets for prices exceeding a certain threshold.[20] After reviewing evidence, FERC terminated its investigations of several sellers, and many other sellers were never targets of a FERC investigation.[21]

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period for consideration of requests for rehearing of those orders. *See* Order Granting Rehearing for Further Consideration, *Coral Power, L.L.C.*, Docket Nos. EL03-151-004 & EL03-186-005 (FERC Oct. 1, 2004); Order Granting Rehearing for Further Consideration, *Aquila Merchant Servs., Inc.*, Docket Nos. EL03-166-004 & EL03-199-004 (FERC May 4, 2004) (Powerex); Order Granting Rehearing for Further Consideration, *Arizona Pub. Serv. Co.*, Docket Nos. EL03-168-003 & EL03-169-003 (FERC Mar. 24, 2004) (Puget Sound Energy, Inc.; Public Service Company of New Mexico); Order Granting Rehearing for Further Consideration, *Public Serv. Co. of New Mexico*, Docket No. EL03-200-005 (FERC Sept. 6, 2005).

[19] Affidavit of Patrick R. Crowley at 25:24-26:1, 26:23-26:25, *Powerex Corp.*, Docket Nos. EL03-166-000 & EL03-199-000 (FERC filed Oct. 31, 2003). As part of the settlement between FERC Staff and Powerex, they submitted a Joint Explanatory Statement, which stated that the Staff had found "no probative evidence that Powerex engaged in or facilitated any" prohibited trading practices. Joint Explanatory Statement at 3, *Powerex Corp.*, Docket Nos. EL03-166-000 & EL03-199-000 (FERC filed Oct. 31, 2003). Instead, the evidence "show[ed] that Powerex was *a valuable and reliable supplier of energy and ancillary services to the California organized markets throughout the period*." *Id.* (emphasis added).

[20] *See* Order Requiring Demonstration That Certain Bids Did Not Constitute Anomalous Market Behavior, *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347, at 62,359 (2003).

[21] *See, e.g.*, Letter From William F. Hederman, Director, Office of Market Oversight and Investigations, FERC, to Paul W. Fox, Bracewell & Patterson, LLP (May 12, 2004) (Powerex); Letter From William F. Hederman, Director, Office of Market Oversight and Investigations, FERC, to Robert H. Loeffler, Morrison & Foerster LLP (May 12, 2004)

Proceedings Below

Proceedings at FERC

In March 2002, California filed a complaint with FERC against sellers of wholesale electricity in California during 2000 and 2001. *See* Complaint, *California ex rel. Lockyer v. British Columbia Power Exchange Corp.*, Docket No. EL02-71-000 (FERC filed Mar. 20, 2002) ("California FERC Compl."). California asserted that those sellers had failed to file their rates, as required by § 205(c), and that the failure rendered unlawful every transaction at issue. *See id.* at 2. Among other remedies, California sought an order requiring sellers to refund the difference between prices for those sales and just-and-reasonable rates. *See id.* at 24-25.

California presented two theories to support its claim. First, California contended that market-based rate tariffs are unlawful under the FPA because they do not permit FERC to determine in advance whether actual rates charged in particular market transactions are just and reasonable. *See id.* at 3-16. Second, California argued that, even if market-based rate tariffs comport with the FPA, a seller's rates can be considered properly filed only if the seller complies with FERC's reporting requirement by submitting information on the prices at which actual sales occurred. California alleged that sellers had failed to comply with those reporting requirements because they had reported aggregated sales data rather than data on specific transactions. *See id.* at 4, 16-23.

In response to California's complaint, sellers explained that California's general challenge to FERC's approval of market-based rate tariffs had been rejected in previous FERC orders. *See, e.g.*, Motion to Intervene, Motion to

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(AES Placerita, Inc.); Letter from William F. Hederman, Director, Office of Market Oversight and Investigations, FERC, to John T. Stough, Jr., Hogan & Hartson LLP (May 12, 2004) (Public Service Company of New Mexico). Petitioners PPL EnergyPlus, LLC and PPL Montana, LLC were never targets, and AES Placerita, Inc. was not involved in either of the orders to show cause referenced in footnote 17.

Dismiss and Answer of Powerex Corp. to Complaint at 6-10, 17-18, *California ex rel. Lockyer v. British Columbia Power Exchange Corp.*, Docket No. EL02-71-000 (FERC filed Apr. 9, 2002). Sellers acknowledged that some quarterly transaction reports contained aggregated, rather than transaction-specific, information. But sellers contended that nothing in FERC's orders approving their market-based rate tariffs (or in any other FERC rule or order) required otherwise. *See id.* at 15, 18-21.

In May 2002, FERC issued an order dismissing in part, denying in part, and granting in part California's complaint. *See* Pet. App. 21a. First, FERC dismissed the complaint as an impermissible collateral attack on prior FERC orders approving market-based rate tariffs. *See id.* at 38a.

Second, FERC rejected California's challenge to the legality of market-based rate tariffs on the merits (to the extent that it was not a collateral attack). FERC explained that its *ex ante* determination that a seller lacks market power satisfies § 205's requirement that the seller's rates be just and reasonable. *See id.* at 40a-41a.[22] FERC further noted that the quarterly transaction reports provided "an efficient and adequate means for [FERC] and the public to examine on a continuing basis whether a seller and its affiliates lack market power" and to identify "pricing trends, discriminatory patterns, or other indicia of the exercise of market power." *Id.* at 42a. FERC explained that its market-based rate regime satisfied § 205(c)'s filing requirement because "the on-file market-based umbrella tariff (which was the subject of Commission approval) preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so." *Id.* at 43a.[23]

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[22] *See* Pet. App. 41a ("In the case of market-based rates, the just and reasonable standard of FPA § 205(e) is satisfied by the Commission's determination, prior to the effectiveness of those rates, that the utility (and its affiliates) lacks market power or has taken sufficient steps to mitigate market power.").

Third, FERC granted the complaint in part, holding that FERC's orders approving sellers' market-based rate tariffs required those sellers to provide transaction-specific information in their quarterly reports and that some sellers had not complied with that requirement. *See id.* at 48a-51a.[24] FERC, however, rejected California's contention that deficiencies in the reports meant that "no rates were lawfully on file in the first instance." *Id.* at 53a. It explained that it was sellers' market-based rate tariffs, "not the quarterly reports," that "constitute[d] the authorization to sell at market-based rates" and that "reporting deficiencies . . . d[id] not invalidate market-based pricing tariffs as lawful filed rates." *Id.*[25] Exercising its broad remedial discretion, FERC concluded that the appropriate remedy for the reporting deficiencies was to direct sellers to submit non-aggregated sales information that had not been provided in previous quarterly reports. *See id.* at 51a-54a.

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[23] *See* Pet. App. 45a (explaining that market-based rate tariffs fulfill the notice function of § 205(c) because "purchasers know in advance that . . . the rates could 'fluctuate widely and rapidly (every hour or less in the [Cal-]ISO and [Cal-]PX) according to supply and demand and any other consideration taken into account by buyers and sellers in the course of business'"; purchasers therefore "can predict in advance the consequences of relying, for example, on last minute spot purchases in a sellers' market") (quoting California FERC Compl. at 9). FERC also observed that, "[i]n a buyers' market, as existed in California in the first years after restructuring, the consequences of heavy reliance on spot markets were favorable to purchasers. Presumably, this is why the Attorney General did not challenge market-based tariffs and our notice and filing requirements during that period, even though, for all practical purposes, the tariffs and requirements operated then as they did in 2000-01." *Id.* at 45a-46a n.40.

[24] *See also* Pet. App. 48a ("That is not to say that the after-the-fact reports establish the market rate but, rather, they are an important tool in assuring that a seller's use of market-based rates remains reasonable.").

[25] *See* Pet. App. 53a ("Power sales made pursuant to a previously accepted market-based rate tariff are, in effect, pre-authorized pursuant to the acceptance for filing of the market-based rate tariff. The quarterly reports allow for monitoring and oversight of that tariff.") (footnote omitted).

California petitioned for rehearing, which FERC denied. The Commission reaffirmed that its market-based rate regime satisfies § 205(c)'s filing requirement. It explained that its finding that a seller cannot exercise market power establishes that the seller "will charge competitive rates that are just and reasonable" and that "[q]uarterly reports provide a means for examining whether the utility continues to lack market power and, thus, that its rates remain just and reasonable, as well as for determining whether the utility's rates are unduly discriminatory." *Id.* at 69a.[26]

FERC also expanded on its rationale for denying the refunds California requested. While it had "found that some sellers were in non-compliance with one requirement, *i.e.*, [FERC]'s requirements for reporting market-based transactions," FERC explained that California sought "relief for different, unproven claims, namely that sellers charged unjust and unreasonable rates and engaged in 'prohibited schemes.'" *Id.* at 75a. FERC also held that California had failed to show any connection between deficiencies in reporting and any unjust-and-unreasonable rates or "prohibited schemes." *Id.* at 75a-76a, 78a-79a. Given those failures of proof, FERC held that it could not order sellers to refund the difference between rates charged – which had not been shown to be unjust and unreasonable – and an unproven just-and-reasonable rate. FERC further explained that disgorgement of profits would be a disproportionate remedy for the reporting deficiencies because, among other reasons, "there appears to have been some legitimate confusion as to [FERC]'s expectations," and that confusion was "due at least in part to the fact that many sellers filed aggregated data in their quarterly reports for years without having been challenged by any market-participant." *Id.* at 78a; *see id.* at 77a-79a.

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[26] FERC also rejected California's claim that quarterly reports must be treated as new § 205 filings, explaining that they "simply report the actual transactions that were previously authorized by [FERC], and thus do not constitute new § 205 rate filings." Pet. App. 68a n.12.

Proceedings in the Ninth Circuit

California petitioned for review under 16 U.S.C. § 825*l*(b). The Ninth Circuit upheld FERC's authorization of market-based tariffs, concluding that market-based rate tariffs comport with the FPA because FERC determines that the seller lacks market power and requires the seller to report on its transactions. *See* Pet. App. 9a-11a.[27]

Turning to FERC's decision not to order refunds, the court held that FERC misunderstood its authority under § 205 to order refunds for violations of its reporting requirements. *See id.* at 2a, 14a-15a, 17a-18a. The court acknowledged FERC's understanding that § 205(e) did not permit FERC to order the refunds sought by California in this case because sellers' market-based rate tariffs were made effective only after FERC approval. But the Ninth Circuit concluded that FERC's interpretation of § 205 "comport[ed] neither with the statutory text nor with the [FPA]'s 'primary purpose' of protecting consumers." *Id.* at 18a; *see id.* ("[T]he § 205(e) refund remedy is, practically speaking, eliminated under the scheme as FERC would have us interpret it."). Elaborating on the latter assertion, the Ninth Circuit explained that "[t]he FPA cannot be construed to immunize those who overcharge and manipulate markets in violation of the FPA." *Id.* The Ninth Circuit held that FERC had the power under § 205 to order refunds for all of the transactions at issue in this case because "[t]o cabin FERC's section 205 refund authority under the circumstances of this case would be manifestly contrary to the fundamental purpose and structure of the FPA." *Id.* at 17a. The court of appeals remanded the case to FERC "to reconsider its remedial options in the first instance." *Id.* at 18a.

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[27] The court disagreed, however, with FERC's conclusion that California's complaint was a collateral attack on FERC's prior orders approving market-based rate tariffs. *See* Pet. App. 11a n.5.

In October 2004, sellers filed a timely petition for rehearing, which the court denied 21 months later without comment. *See* Pet. App. 80a-81a.

REASONS FOR GRANTING THE PETITION

WHETHER FERC HAS AUTHORITY TO ORDER RETROACTIVE REFUNDS UNDER § 205 OF THE FEDERAL POWER ACT IS A QUESTION OF EXCEPTIONAL IMPORTANCE ON WHICH THE COURTS OF APPEALS DIRECTLY CONFLICT

A. The Ninth Circuit's Holding That FERC Has Authority To Order Refunds Under § 205 Violates The FPA's Plain Text And Conflicts With Decisions Of This Court

The Ninth Circuit held in this case that § 205 of the FPA authorizes FERC to order retroactive refunds for sales, beyond the narrow limits of § 205(e). *See* Pet. App. 14a-18a; *see also PUC v. FERC*, 462 F.3d at 1045 (same panel as this case) (describing the Ninth Circuit's opinion in this case as holding "that FERC erred as a matter of law in concluding retroactive refunds were not available under § 205"). The Ninth Circuit's holding violates the plain language and structure of the FPA, and disregards this Court's precedents.

1. Only one subsection of § 205 provides FERC with any refund authority, and that limited grant of refund power is inapplicable here. Under § 205(e), FERC has discretion to initiate a hearing to review the lawfulness of any rate change. *See* 16 U.S.C. § 824d(e).[28] If FERC

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[28] Section 205(e) provides in pertinent part as follows:

> Whenever any . . . new [rate] schedule is filed[,] the Commission shall have authority, either upon complaint or upon its own initiative without complaint, . . . to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission . . . may suspend the operation of such schedule and defer the use of such rate, charge, classifi-

commences a hearing, it can suspend the effectiveness of the changed rate for up to five months beyond the date on which it would otherwise have gone into effect. *See id.* After five months (or sooner if FERC chooses), the seller may begin selling under the new rate, even if FERC's investigation has not concluded. *See id.* But, if a tariff has been suspended and then permitted to take effect pending administrative review, and FERC ultimately determines that the rate change is unlawful, FERC has discretion to order the seller to refund to its customers the difference between the proposed rate and the rate that FERC ultimately determines is just and reasonable. *See id.*

Section 205(e)'s limited grant of refund authority does not apply here. It applies only when a proposed rate increase takes effect "at the end of such period" of suspension and only while FERC's § 205 investigation is ongoing. *Id.*; *see* FERC C.A. Br. at 4-5 (filed Feb. 13, 2003) (explaining that FERC's § 205(e) refund authority exists only when "FERC ultimately determines that [an] *initially-suspended rate* was not just and reasonable") (emphasis added).[29] Here, FERC never suspended petitioners'

> cation, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect . . . . If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.

16 U.S.C. § 824d(e).

[29] *See generally East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 942 (D.C. Cir. 1988) ("[a]llowing these retroactive reductions in filed rates is a necessary compromise to accommodate delays in the approval process").

market-based rate tariffs; nor did it permit sellers to transact under market-based rate tariffs until after it had found their proposed market-based rate to be just and reasonable and had accepted their tariffs for filing.[30] Section 205(e) therefore provides no basis for FERC to order refunds in this case.[31]

FERC's lack of authority to order retroactive refunds in this case is confirmed by FPA § 206 – the only other provision of the FPA that contains a textual grant of refund authority to FERC. FERC has authority under § 206(a) to initiate a hearing, on complaint or on its own motion, to investigate whether an existing rate complies with § 205(a) and (b). *See* 16 U.S.C. § 824e(a). If FERC finds that the existing rate is "unjust, unreasonable, unduly discriminatory or preferential," it may take corrective action, such as determining a "just and reasonable rate . . . to be thereafter observed and in force." *Id.* In addition to setting a rate "to be thereafter observed," § 206(b) permits FERC to order a seller to refund the difference between the existing rate and the rate that FERC determines is just and reasonable. *See id.* § 824e(b). But FERC cannot order refunds for all sales at that unjust-and-unreasonable rate. Instead, FERC's refund authority is confined to those sales that occurred *after* the statutory "refund effective date," which at the time at issue in this proceeding could be no earlier than 60 days after either the filing of the complaint or the publication of FERC's decision to initiate an investigation. *See* 16 U.S.C. § 824e(b) (2000); *see also* Pet. App. 53a ("section 206 bars retroactive refund liability"); FERC C.A. Br. at 4-5 (explaining that complaints asserting that existing rates are unlawful "are governed by FPA § 206, under which *only prospective relief is available*") (emphasis added).[32] In sum, the decision below violates the FPA's plain language, which does not grant FERC authority to order retroactive refunds, except under the limited exceptions in § 205(e)'s suspension clause and § 206(b)'s refund-effective-date provision.[33]

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[30] *See, e.g., British Columbia Power Exchange*, 80 FERC ¶ 61,343, at 62,136 ("accept[ing] for filing, without suspension or hearing, an application of [Powerex] to transact as a power marketer in the United States at market-based rates").

[31] Moreover, FERC has no inherent authority to order refunds under § 205 because "an agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

2. The FPA's legislative history confirms the error of the Ninth Circuit's conclusion that FERC has general authority under § 205 to order refunds. When Congress was considering legislation that became the FPA in 1935, it rejected a proposed provision that would have authorized FERC to issue "reparation orders." S. Rep. No. 74-621, at 20 (1935). Congress rejected that provision because it concluded that "wholesale customers of electric utilities should not be permitted to accept service . . . without complaint and thereafter be permitted reparations." *San Diego Gas & Elec.*, 93 FERC ¶ 61,121, at 61,379 (citing *Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. 1684-85 (1935)); *see Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 258 (1951) (Frankfurter, J., dissenting) ("Wholesale consumers of electric energy were apparently considered, as a rule, adequately protected by the provisions of the Act authorizing the Commission to grant prospective relief and, in certain circumstances, to order refunding of sums accumulated during the pendency of rate proceedings.") (citing 16 U.S.C. §§ 824d(e), 824e(a)).

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[32] The Ninth Circuit did not suggest that § 206 authorizes the refunds requested by California. Nor could it have, because California's complaint was filed in March 2002, *after* the transactions of which it complains. *See* Pet. App. 5a.

[33] FERC may have authority in limited circumstances to order retrospective monetary relief under FPA § 309, which authorizes FERC to "issue . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of" the FPA. 16 U.S.C. § 825h; *see Boston Edison Co. v. FERC*, 856 F.2d 361, 369-70 (1st Cir. 1988) (§ 309 is "far from an unbounded grant of remedial authority"). In this case, however, neither FERC nor the court below invoked § 309. Moreover, no party relied on that provision as support for the result reached by the court below. FERC has ordered retrospective monetary relief when a seller has charged a rate without prior approval from FERC, *see Delmarva Power & Light Co.*, 24 FERC ¶ 61,199, at 61,461 (1983), *modified on other grounds*, 24 FERC ¶ 61,380 (1983), *petition for review denied*, *City of Newark v. FERC*, 763 F.2d 533 (3d Cir. 1985), or has violated a condition in FERC's order approving the seller's market-based rate tariff, *see Washington Water Power Co.*, 83 FERC ¶ 61,282 (1998). Neither case supports the decision below. Unlike in *Delmarva Power*, the sales at issue here occurred under FERC-approved tariffs. *See* Pet. App. 44a-45a, 68a n.12, 69a-70a. In *Washington Water Power*, the seller engaged in an unauthorized preferential transaction with an affiliate. As a punishment, FERC ordered the seller to disgorge profits resulting from the prohibited transaction. Here, by contrast, petitioners did not engage in any self-dealing or otherwise prohibited transactions. Moreover, FERC found no evidence that reporting violations at issue here led to any tangible harm. FERC found that California had failed to show any connection between deficiencies in reporting and any unjust-and-unreasonable rates or prohibited schemes. *See id.* at 75a-76a, 78a-79a. FERC also may have authority to punish a seller's violation of its own tariff by ordering retrospective monetary remedies, *see Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 967 (D.C. Cir. 2003), but no such violations have been proved here, *see* Pet. App. 75a-76a.

As originally enacted, the FPA did not permit even the limited retroactive relief now available under § 206(b)'s "refund effective date" clause. *See* 49 Stat. 852. Instead, the FPA "permitted the Commission to order refunds in Section 206 proceedings prospectively only, *i.e.*, prospectively from the date of the Commission's decision" that the existing rate had become unlawful. *San Diego Gas & Elec.*, 93 FERC ¶ 61,121, at 61,377.

The provision for a "refund effective date" was added to the FPA in 1988. *See* Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299, 2299-2300 (1988). Under that amendment, the refund effective date could be no earlier than 60 days *after* either the filing of the complaint or the publication of FERC's decision to initiate an investigation. *See id.* The reason for that limited grant of refund authority was to prevent utilities from delaying the effectiveness of FERC-imposed rate changes by engaging in dilatory behavior during § 206 investigations. S. Rep. No. 100-491, at 3-4 (1988).

Finally, in 2005, Congress amended § 206(b) to provide, as it now does, that the refund effective date can be as early as (but not earlier than) the date of the complaint or the date of publication of FERC's notice of intention to institute an investigation. *See* Electricity Modernization Act of 2005, Pub. L. No. 109-58, Tit. XII, § 1285, 119 Stat. 594, 941, 980-81.[34] Significantly, the House of Representatives rejected an amendment that, in the words of its sponsor, addressed FERC's authority "to issue orders requiring refunds for all electricity overcharges." 151 Cong. Rec. H2332 (daily ed. Apr. 20, 2005) (statement of Rep. Dingell). The amendment provided that, "with regard to market-based rates, [FERC] may establish an earlier refund effective date." *Id.* (Dingell amendment § 1291). Representative Dingell contended that the amendment was necessary because H.R. 6 – the bill that eventually was enacted into law – did not "authorize FERC to grant *full* refunds to consumers" who were adversely affected by wholesale market-based electricity prices, "but rather allows refunds only from the date when the complaint is filed." *Id.* at H2333 (emphasis added). As Representative Barton put it, "[t]he Dingell substitute would require retroactive refunds for market-based rates. It would go back into contracts that have already been executed and electricity [that has been] consumed and money for that electricity has been paid, and for the first time create a retroactive refund. I think that is unwise and unnecessary." *Id.* The House of Representatives agreed with Representative Barton, rejecting the Dingell amendment by a 243-188 vote. *See id.* at H2380.

Thus, Congress has thrice addressed FERC's power to order refunds for past sales. Each time, it declined to grant FERC authority to order retroactive refunds, outside of the limited circumstances in which § 205(e) and

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[34] Because California's complaint was filed after the transactions of which it complains, the retroactive relief sanctioned by the Ninth Circuit in this case would be unavailable even under the current version of § 206(b).

§ 206(b) apply. Indeed, *after* the Ninth Circuit issued the opinion in this case, Congress declined to amend the FPA to create the very refund authority that the court below concocted. The Ninth Circuit's holding therefore circumvents Congress's plain, longstanding intent.

3. In addition to ignoring the plain text, structure, and legislative history of the FPA, the Ninth Circuit disregarded this Court's decisions on the filed rate doctrine when it held that FERC has general authority to order refunds under § 205. Sections 205 and 206 of the FPA provide the statutory basis in the energy context for the "filed rate" or "filed tariff" doctrine. That doctrine prohibits a seller of power from collecting a rate other than the one filed with FERC and prevents FERC from imposing a rate increase or decrease for power already sold (except in the limited circumstances permitted by § 205(e) and § 206(b)). *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981) (explaining the doctrine).[35]

The filed rate doctrine's prohibition on retroactive ratemaking derives from § 206, under which FERC's power "is limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order." *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956). In an early decision applying the filed rate doctrine under the FPA, this Court relied on the fact that "Congress withheld from [FERC] power to grant reparations." *Montana-Dakota Utils.*, 341 U.S. at 254.[36] This

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[35] Although *Arkansas Louisiana Gas* involved the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* ("NGA"), the Court there noted that § 4 and § 5 of the NGA, 15 U.S.C. §§ 717c-717d, "are in all material respects substantially identical" to § 205 and § 206, respectively, of the FPA. 453 U.S. at 577 n.7 (internal quotation marks omitted). The principal difference between the relevant provisions of the two Acts – namely, that NGA § 5 (the analogue to FPA § 206) contains no provision for a "refund effective date" and is thus purely prospective, *compare* 16 U.S.C. § 824e(a)-(b) *with* 15 U.S.C. § 717d(a) – does not implicate the analysis in this petition. Accordingly, this petition follows the established practice of citing precedents under the NGA and the FPA interchangeably.

[36] *Accord FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968) ("[T]his Court has repeatedly held that [FERC] has no reparation power.");

Court has consistently applied the filed rate doctrine in a variety of regulatory contexts[37] and has stated that abrogation of that doctrine "must come from Congress, rather than from this Court." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986).[38]

The filed rate doctrine, as articulated in this Court's cases, reinforces the conclusion that is apparent from the text of the FPA: FERC lacks power to order retroactive refunds, unless it acts under the narrow grants of authority in § 205(e) and § 206(b). The Ninth Circuit here made no attempt to square its holding that FERC can order retroactive refunds under § 205 with this Court's precedents construing the FPA to prohibit the Commission from ordering retroactive refunds or otherwise altering retroactively the rates paid for energy sold except in the very limited circumstances specifically provided in the Act.[39]

FPC v. Hope Natural Gas Co., 320 U.S. 591, 618 (1944) (FERC "has no power to make reparation orders").

[37] In *Arkansas Louisiana Gas*, the Court explained that the filed rate doctrine "has its origins in this Court's cases interpreting the Interstate Commerce Act, and has been extended across the spectrum of regulated utilities." 453 U.S. at 577 (citations omitted).

[38] In addition to the restrictions that the filed rate doctrine places on both sellers and FERC, the doctrine bars "civil lawsuits that have the effect of contradicting or undercutting a tariffed rate." *Town of Norwood v. FERC*, 202 F.3d 392, 400 n.4 (1st Cir. 2000) (citing *Arkansas Louisiana Gas*); *see Montana-Dakota Utils.*, 341 U.S. at 251-54 (applying the doctrine to bar a civil action).

[39] Although the Ninth Circuit opined that, when transaction-specific reporting requirements are not followed, "[p]ragmatically, . . . there is no filed tariff in place at all," Pet. App. 15a, it did not hold that sellers did not have rates on file during the relevant period. Instead, in asserting that FERC had misunderstood the importance of its reporting requirements, the court below stated that, "[i]f the tariff is interpreted as FERC urges here, then the tariff runs afoul of [Supreme Court precedent], the filed rate doctrine, and the FPA. If, *on the other hand*, we view the reporting requirements as integral to the tariff, with implied enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory rates, then a market-based tariff is permitted." *Id.* at 15a-16a (emphasis added). Thus, the court *rejected* an interpretation that would have had the effect of holding that sellers did not

B. The Ninth Circuit's Decision Conflicts With The Holdings Of Other Circuits

1. The Ninth Circuit's decision directly conflicts with decisions of the D.C. Circuit, which has repeatedly recognized that FERC lacks authority to order refunds, except under the plain terms of § 205(e) and § 206(b). In *Consolidated Edison*, for example, the D.C. Circuit rejected an attempt to obtain retroactive relief under § 205. There, buyers cited § 205(d)'s language permitting FERC to waive the usual 60-day notice period for tariff changes on a finding of good cause as authorizing FERC to order "retroactive relief upon a finding of good cause." 347 F.3d at 969. The D.C. Circuit disagreed, relying on one of its prior decisions interpreting similar language in the NGA as not permitting retroactive relief. *See id.* (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990)). In *Columbia Gas*, the court had held that, although FERC can waive the notice requirement for a tariff filing, it cannot "waive" the filed rate doctrine by ordering retroactive relief. *See* 895 F.2d at 794-97.

Similarly, in *Indiana & Michigan Electric Co. v. FPC*, 502 F.2d 336 (D.C. Cir. 1974), the court explained that the Commission's power "to order refunds arises from section 205(e) of the [FPA] and is directly tied to the exercise of the Commission's suspension power." *Id.* at 344-45 (footnote omitted); *see East Tennessee Natural Gas*, 863 F.2d at 942 (referring to the cognate provision of the NGA as the "only statutory exception to the rule prohibiting retroactive rate changes"). The D.C. Circuit has further recognized that § 206, which "affords the exclusive avenue to rate relief," *Papago Tribal Util. Auth. v. FERC*, 610 F.2d 914, 928 (D.C. Cir. 1979), "preclud[es] [FERC] from ordering refunds, even when it determines that the rates in effect are unjust and unreasonable." *Indiana & Michigan*

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have rates on file. Instead, it concluded that the filed rate doctrine applies, but that, under § 205 and its "implied enforcement mechanisms," FERC has power to order retroactive refunds in response to violations of its reporting requirements.

Elec., 502 F.2d at 345; *accord Public Serv. Co. of New Hampshire v. FERC*, 600 F.2d 944, 958 (D.C. Cir. 1979); *see Consolidated Edison Co. of New York, Inc. v. FERC*, 958 F.2d 429, 431 n.4 (D.C. Cir. 1992) (R.B. Ginsburg, J.) ("[FERC] may not order refunds under [NGA] § 5(a); it may determine only the just-and-reasonable rate 'to be thereafter observed.'").

Those limitations on FERC's ability to order retroactive relief allow utilities "to rely on a filed rate, once [FERC] has permitted it to become effective, until such time as the rate is proved to be unlawful." *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 184 (D.C. Cir. 1986) (R.B. Ginsburg, J.). Thus, the D.C. Circuit repeatedly has recognized that "FERC may not order a retroactive refund based on a post hoc determination of the illegality of a filed rate's prescription." *Id.* at 189 n.7; *accord City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979) (the FPA "bars utility refunds for past excessive rates"); *see East Tennessee Natural Gas*, 863 F.2d at 941 ("[r]etroactive changes in rates violate the filed rate doctrine").

In view of the D.C. Circuit's traditional prominence in adjudicating petitions for review of FERC orders, the Ninth Circuit's divergence from the prevailing rule in the D.C. Circuit is especially troubling. Even without any other conflicting circuits, the existence of the Ninth Circuit's conflict with the D.C. Circuit on this important question would by itself warrant a grant of certiorari.

2. But, like the D.C. Circuit, other circuits have recognized that FERC lacks a generalized retroactive refund power. In *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1st Cir. 1984) (Breyer, J.), the First Circuit affirmed FERC's decision that DOMAC, a liquefied natural gas ("LNG") seller, must share with Boston Gas Company "revenues it obtained from selling 'cool-down' services to LNG tankers" because such services were provided "in part" with DOMAC's natural gas facilities. *Id.* at 1221. To that end, FERC had "decided that the cool-down service revenues should be split, 50-50, between DOMAC and its customers." *Id.* But the court *rejected* FERC's authority to order DOMAC to *refund* customers' shares: "Neither section 4 nor section 5 [of the NGA] authorizes [FERC] to make adjustments or to order refunds to compensate customers for *past* excessive charges by the utility – *i.e.*, charges made prior to the time a proposed rate increase took effect; both are directed only at the reasonableness of prospective or increased rates." *Id.*[40]

Likewise, the Tenth Circuit has noted that "any relief from an unjust rate ordered by [FERC] is *prospective* only; it may not have retroactive effect." *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1488 (10th Cir. 1995) (emphasis added). More generally, the Eighth Circuit has acknowledged that "Congress anticipated cases in which rates would be found unreasonable, and subject to future adjustment, but would *not be subject to refund*" under the FPA. *Cooperative Power Ass'n v. FERC*, 733 F.2d 577, 580 (8th Cir. 1984) (emphasis added).

C. The Proper Interpretation Of FERC's Statutory Refund Authority Is Of Enormous Practical Importance

1. FERC has removed any doubt that the Ninth Circuit's decision dramatically expanded its refund power. Responding to a letter from Senator Feinstein regarding the court of appeals' decision in this case, FERC's then-Chairman observed that "the Ninth Circuit held that [FERC] has authority under the [FPA] to order retroactive refunds in the circumstances of this case for sellers that failed to comply with certain [FERC] reporting requirements." Letter from Pat Wood, III, Chairman, FERC, to the Hon. Dianne Feinstein, Docket No. EL00-95 (FERC filed Oct. 14, 2004). The Chairman explained that "the Ninth Circuit interpreted the [FPA] to provide [FERC] with *broader refund authority than [FERC] believed the Act provided.*" *Id.* (emphasis added). But he expressed no reluctance to use that new-found power, stating that he "appreciate[d] the court's clarification of our authority under the [FPA] as it enhances our authority to protect customers from misconduct by public utilities." *Id.* Similarly, in a report to Congress on its resolution of the proceedings arising out of 2000-2001 California wholesale-electricity sales, FERC stated that the "Ninth Circuit [in this case] interpreted the FPA to provide [FERC] with broader authority than [FERC] believed the Act provided." FERC 2005 Report at 7 n.12.

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[40] *Accord Boston Edison*, 856 F.2d at 369 ("[I]t is settled that [FERC] lacks power to order 'reparations' in compensation even for unjust or unreasonable past rates.") (internal quotation marks omitted).

The Ninth Circuit's aggrandizement of FERC's power may be welcome to the Commission, but it expands FERC's authority beyond congressional limits that judicial review must enforce, not flout. With this new tool in its regulatory arsenal, FERC can extend the destabilizing effects of the Ninth Circuit's pernicious reading of the FPA to other parts of the country, with even broader consequences to the national power supply.

2. Adverse commercial consequences will undoubtedly flow from the Ninth Circuit's decision. The court's creation of a new refund authority under § 205 undermines the regulatory stability of the filed rate doctrine and threatens the growth and competitiveness of the nation's power markets. By "authorizing only prospective rate changes," *Consolidated Edison*, 347 F.3d at 969, the filed rate doctrine guarantees to sellers "a right to rely on the legality of the filed rate," *Sea Robin Pipeline*, 795 F.2d at 189 n.7, until FERC finds the filed rate unlawful and determines a rate "to be thereafter observed and in force" under § 206, 16 U.S.C. § 824e(a).[41] The Ninth Circuit's

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[41] *Accord East Tennessee Natural Gas*, 863 F.2d at 942 (recognizing the "basic principle" that utilities regulated by FERC "are entitled to rely on filed rates").

Indeed, FERC has recognized that ordering refunds can "create an unacceptable amount of risk and uncertainty for future market participants in the [West], since it would set a precedent that the contract price for power may always be subject to change – without any advanced warning." *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy* new rule destroys that predictability by subjecting sellers to refunds for sales conducted under approved tariffs, without regard to whether those sellers had any notice that their sales might be subject to refund.

Left uncorrected, the Ninth Circuit's erroneous expansion of FERC's power to order refunds for past sales will likely have a chilling effect on future investment in Western wholesale electricity markets. Instead of investing earnings in generation and transmission facilities to increase the supply of power, prudent sellers will carry reserves to insure against retrospective rate-setting and refunds. Yet new investment is precisely what California and other Western States desperately need to avoid supply shortages and further price shocks. Indeed, FERC recognized in a report to Congress that "restoring confidence in California markets is critical to motivating future investment in transmission and generation facilities necessary to the long-term health and competitiveness of the wholesale electricity market." FERC 2005 Report at 14. Only the certainty provided by fealty to congressional text and purposes can restore that confidence.

3. The chilling effect on investment-backed expectations created by the decision below will also dramatically affect the natural gas industry, which is regulated by the NGA. Sections 4 and 5 of the NGA parallel FPA § 205 and § 206. *See supra* note 35. Those parallels have led this Court and numerous lower courts to apply precedents under the FPA to the NGA, and vice versa. *See Arkansas Louisiana Gas*, 453 U.S. at 577 n.7 (Court has followed an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes"). Thus, the Ninth Circuit's erroneous expansion of FERC's remedial authority raises the specter of infecting the natural gas industry with an errant and disruptive set of refund rules as well.

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and/or Capacity Markets in the Pacific Northwest, 105 FERC ¶ 61,183, at 61,965 (2003), *petitions for review pending*, *Port of Seattle v. FERC*, Nos. 03-74139 *et al.* (9th Cir., to be argued Jan. 8, 2007).

4. Even if none of the foregoing national harms were to occur, the destabilizing effect on the Western States' recovering wholesale electricity markets alone would justify a grant of certiorari. FERC's exercise of its judicially created § 205 refund authority on remand has the potential to wreak havoc in ongoing regulatory and judicial proceedings stemming from events in California's electricity markets during 2000 and 2001.[42] For six years, parties have based strategic litigation and settlement decisions on an understanding of FERC's statutory refund authority (an understanding shared by FERC) that has now been upset. That disruption threatens tremendous economic consequences. At the end of 2005, FERC boasted settlements with sellers arising from the events of 2000 and 2001 worth more than $6.3 billion. *See* FERC 2005 Report at 3. Billions of additional dollars are at stake in the remaining proceedings. *See id.* at 9. In 2005, Congress directed FERC to "seek to conclude its investigation into the unjust or unreasonable charges incurred by California during the 2000-2001 electricity crisis as soon as possible." Energy Policy Act of 2005, Pub. L. No. 109-58, § 1824(1), 119 Stat. 594, 1134. The ability to achieve that resolution, however, is clouded by the regulatory uncertainty created by the Ninth Circuit's decision below. Moreover, another panel of the Ninth Circuit (Browning, Pregerson, and Berzon, JJ.) recently extended the destabilizing effects of the holding in this case. That panel relied on the decision below as a "critically important" basis for its holding that the *Mobile-Sierra*[43] doctrine – which limits FERC's authority under § 206 to modify contracts and to order refunds – does not apply to contracts entered into under FERC's market-based rate regime. *Public Util. Dist. No. 1 of Snohomish County v. FERC*, Nos. 03-72511 *et al.*, 2006 WL 3717533, at *24 (9th Cir. Dec. 19, 2006);

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[42] *See PUC v. FERC*, 462 F.3d at 1036-45 (describing many ongoing administrative and judicial proceedings).

[43] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

see also Public Utils. Comm'n v. FERC, Nos. 03-74207 & 03-74246, 2006 WL 3717673, at *4 (9th Cir. Dec. 19, 2006).

Furthermore, the Ninth Circuit's radical understanding of the FPA is especially troublesome, considering that that court hears appeals in a large number of cases arising from the events in California's electricity markets during 2000 and 2001. Indeed, the D.C. Circuit has issued orders transferring to the Ninth Circuit petitions for review of FERC orders arising from the California energy crisis that have been filed in that court.[44] And the Ninth Circuit has made an administrative determination to cede control over this critical area to three judges by assigning more than a hundred cases involving both the California *and* the Pacific Northwest markets to the very same panel that rendered the erroneous decision below.[45] There is therefore no reasonable prospect that the temporizing or correcting influence of other members of the Ninth Circuit will be brought to bear on these colossally important cases.[46]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[44] *See, e.g.*, Order, *Dynegy Power Mktg., Inc. v. FERC*, Nos. 04-1034 *et al.* (D.C. Cir. Feb. 9, 2005) (per curiam); Order, *Calpine Corp. v. FERC*, No. 04-1230 (D.C. Cir. Sept. 8, 2004); Order, *Turlock Irrigation Dist. v. FERC*, Nos. 01-1289 *et al.* (D.C. Cir. May 15, 2002) (per curiam).

[45] *See* Order, *Public Utils. Comm'n v. FERC*, Nos. 01-71051 *et al.* (9th Cir. Oct. 22, 2004).

[46] That reality is underscored by the denial of rehearing en banc in this case. *See* Pet. App. 80a-81a.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-73093

STATE OF CALIFORNIA, EX REL. BILL LOCKYER,
ATTORNEY GENERAL,
Petitioner,

CORAL POWER, LLC, ET AL.,
Intervenors,

MORGAN STANLEY CAPITAL GROUP, INC.,
Respondent-Intervenor,

AES COMPANIES, ET AL.,
Intervenors,

POWEREX CORP., ET AL.,
Respondents-Intervenors,

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner-Intervenor,

WILLIAMS ENERGY MARKETING & TRADING COMPANY,
Intervenor,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

AVISTA CORPORATION,
Intervenor,

LONG BEACH GENERATION LLC,
Respondent-Intervenor.

[Argued and Submitted Oct. 9, 2003]

[Filed Sept. 9, 2004]

Before: THOMAS, McKEOWN, and CLIFTON, Circuit Judges.[*]

THOMAS, Circuit Judge:

This case presents the question, *inter alia*, of whether the Federal Energy Regulatory Commission ("FERC") properly authorized and administered market-based energy tariffs. The State of California ("California"), through its Attorney General, claims that it did not, and that California energy consumers are entitled to as much as $2.8 billion in refunds. We conclude that FERC's authorization of market-based tariffs in this case complied with the Federal Power Act, but that FERC abused its administrative discretion by declining to order refunds for violations of its reporting requirements. We therefore grant California's petition in part and remand this case to FERC for refund proceedings.

I

California's energy crisis in 1995 prompted the California Public Utilities Commission[1] and the California legislature to restructure the electric energy industry. The resulting legislation, Assembly Bill 1890 ("AB 1890"), was designed to dismantle the investor-owned, government-regulated utility model and create a deregulated market in which price would be established by competition. Act of September 23, 1996, 1996 Cal. Legis. Serv. 854, *codified in* Cal. Pub. Util.Code §§ 330-398.5. Under AB 1890, the major investor-owned, vertically-integrated[2] utilities were required to divest a substantial portion of their power generation plants, to sell the output of their remaining generation capacity to a newly created wholesale clearinghouse known as the California Power Exchange Corporation ("CalPX"). CalPX, which was created by AB 1890, was to provide a centralized auction market for the trading of electricity. It was thus deemed a public utility pursuant to the Federal Power Act, *see* 16 U.S.C. § 824(e), and thus subject to regulation by FERC, *see* 16 U.S.C. § 824(b), (d).[3]

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[*] Following oral argument of this case, Judge Hawkins recused himself. Judge McKeown was drawn as a replacement judge.

[1] The Commission is an agency established by the California Constitution. Cal. Const. art. XII. One of the Commission's duties is the regulation of retail rates for electricity charged by investor owned utilities in California. Cal. Pub. Util.Code § 451. The Commission's restructuring order is contained in ***Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Legislation***, D. 95-12-063 (Dec. 20, 1995), ***modified by*** D. 96-01-009 (Jan. 10, 1996).

[2] In the power industry, there are three major vertical components: generation, transmission, and distribution. Generation involves the

AB 1890 created another non-profit entity, the Independent System Operator ("ISO"), also subject to FERC jurisdiction, which was to be responsible for managing California's electricity transmission grid and balancing electrical supply and demand. Its operations were to be governed by a tariff and protocols filed with FERC. Under AB 1890, purchases and sales of wholesale power by investor-owned utilities were now subject to FERC jurisdiction. *So. Cal. Edison*, 307 F.3d at 801.

Thereafter, three major investor-owned utilities filed applications with FERC seeking approval of the establishment of CalPX and the ISO, authority to convey

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production of power through a variety of means. Transmission generally refers to the transmission of high voltage electric power from the points of generation to substations for conversion to delivery voltages. Distribution refers to the delivery of the converted low voltage energy from substations to individual consumers. Under the vertically integrated model, one government-regulated company owned the generation resources, the transmission lines, and the distribution facilities. Under a deregulated model, different entities separately own the generation, transmission, and distribution assets.

[3] This is not our first foray into the thicket of California's attempt to deregulate the power industry. Thus, an exhaustive rendition of the factual background is not required. Further general details are provided in some of our previous decisions. *See, e.g., State of California ex rel. Lockyer v. Dynegy*, 375 F.3d 831, 2004 WL 1488195 (9th Cir. July 6, 2004); *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 801 (9th Cir.2002); *In re California Power Exchange Corporation*, 245 F.3d 1110, 1114-19; *Duke Energy Trading and Marketing, L.L.C. v. Davis*, 267 F.3d 1042, 1045-46 (2001).

operational control of the transmission facilities to the ISO, and authority to sell electrical energy at market based rates. *See Pacific Gas and Electric Co.*, 77 FERC ¶ 61,265 (1996); *Pacific Gas and Electric Co.*, 77 FERC ¶ 61,204 (1996); *Pacific Gas and Electric Co.*, 77 FERC ¶ 61,077 (1996).

A condition of FERC's approval of an entity's market-based rate authority was a FERC determination that the entity lacked, or had adequately mitigated market power in the California markets. FERC conducted these inquiries as a means of carrying out its statutory mandate under the Federal Power Act to ensure "just and reasonable" wholesale rates for electricity. 16 U.S.C. § 824d(a). FERC approved the utilities' requests, and granted permission for the utilities to sell electricity at market-based rates in California. FERC also approved the establishment of the ISO and CalPX, which then commenced operations in late March 1998. *See generally Pacific Gas and Electric Co.*, 81 FERC ¶ 61,122 (1997).

In June 2000, wholesale electricity prices increased dramatically. In August, San Diego Gas & Electric Company filed a complaint under § 206 of the Federal Power Act ("FPA"), 16 U.S.C. § 824e(a), against all sellers of energy and ancillary services into the CalPX and ISO markets. In response, FERC instituted hearing procedures under FPA § 206 to investigate the justness and reasonableness of the rates of sellers that were subject to FERC jurisdiction into the ISO and CalPX markets.

Electricity prices remained at high levels in the winter of 2001, and California's largest utility, Pacific Gas and Electric Company, filed a voluntary petition in bankruptcy under Chapter 11 of the United States Bankruptcy Code. In January of 2001, the Governor of the State of California declared a state of emergency. Pursuant to that order, and in light of rolling blackouts, the Governor directed the State Department of Water Resources ("DWR") to purchase wholesale power on the spot market. By October of 2001, California Energy Resources Scheduler ("CERS"), a division of DWR, had spent approximately $10 billion buying energy on the spot market.

In November of 2000, having reviewed San Diego Gas & Electric's complaint, FERC adopted several reform measures. FERC found that the "California market structure provide[d] the opportunity for sellers to exercise market power" in times of tight supply and that such market power could result in "unjust and unreasonable rates." *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 93 FERC ¶ 61,121 (2000). In addition to ordering structural and rule changes, FERC ordered an evidentiary hearing to determine the appropriate refund. However, FERC limited the refund to ISO and CalPX spot market transactions during the period from October 2, 2000 through June 20, 2001.

A year later, the State of California filed the instant complaint against all sellers of power and ancillary services subject to FERC jurisdiction in markets operated by the ISO and CalPX and sellers of power to CERS (collectively, "California Wholesalers"), alleging that FERC's market-based rate filing requirements violated the FPA and that, even if valid, the reports filed by electricity sellers did not contain the transaction-specific information the FPA requires. California claimed that FERC's improper decision to limit the refund period reduced the refunds owed to California purchasers by as much as $2.8 billion.

In order to remedy the alleged violations, California urged FERC to:

> 1) require the California Wholesalers to comply, on a prospective basis, with Section 205 rate-filing requirements;
>
> 2) to the extent the information [was] not already being provided . . . require the California Wholesalers to provide transaction-specific information to FERC on

all of their short-term sales to the ISO, CalPX and CERS for the calendar years 2000-2001;

3) to the extent that any rates for short-term power sold to the ISO, CalPX, or CERS are found to exceed just and reasonable levels, require the California Wholesalers to refund the difference between the rate charged and a just and reasonable rate, plus interest;

4) issue a declaration specifying that the rates for short-term power sold to the ISO, CalPX, and CERS are not subject to the filed rate doctrine; and

5) institute proceedings to determine whether any other further relief is necessary or appropriate, up to and including the revocation of the California Wholesalers' market based rate authority.

The California Wholesalers contended, and FERC ultimately concluded, that California's complaint amounted to an impermissible collateral attack on prior Commission orders pertaining to FERC's market-based rate authority and procedures, on prior FERC determinations regarding refund liability, and as to FERC's decisions to grant the various defendants their respective market-based rate authority. FERC granted the complaint in part, holding that where the California Wholesalers had reported aggregated rather than transaction-specific data, the reports failed to comply with FPA § 205(c). Rather than ordering refunds for the reporting violations, however, FERC held that "the failure to report transactions in the format required by FERC for quarterly reports is essentially a compliance issue" for which "re-filing of quarterly reports to include transaction-specific data is an appropriate and sufficient remedy." 99 FERC ¶ 61,247 at 62,068 (2002).

California timely filed a petition for review of FERC's decision and properly invokes our jurisdiction to review final orders of FERC pursuant to 16 U.S.C. § 8251(b).

II

The Federal Power Act governs the transmission and wholesale sales of electrical energy in interstate commerce. 16 U.S.C. § 824(b). Pursuant to its authority under the FPA, FERC has exclusive jurisdiction over interstate wholesale power rates. *Id.*; *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 956, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986). The FPA requires that all rates for the transmission and sale of wholesale electricity be filed with FERC and published for public review. 16 U.S.C. § 824d(c). FERC is obligated to ensure that wholesale power rates are "just and reasonable," 16 U.S.C. § 824d(a), and applied in a non-discriminatory manner, 16 U.S.C. § 824d(b); *Entergy Louisiana, Inc. v. Louisiana Public Service Com'n*, 539 U.S. 39, 41, 123 S.Ct. 2050, 156 L.Ed.2d 34 (2003). Indeed, FERC's authority to determine whether wholesale rates are "just and reasonable" is exclusive. *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 371, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988).

Much of the theory that underpins the present controversy has its roots in the "filed rate doctrine," which is central to FERC's operations. "The 'filed rate doctrine' was developed in the 19th century as part of a program to regulate the ruthless exercise of monopoly power by the Nation's railroads." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 138, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) (Stevens, J., dissenting). During that period, railroad companies often charged substantially higher rates on noncompetitive routes, granted secret discounts to preferred shippers, and overcharged competitors of preferred customers. These concerns, among others, led to the passage of the Interstate Commerce Act ("ICA") in 1887. *See* Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended at scattered sections of 49 U.S.C.). The "great purpose" of the ICA, as the Supreme Court has said, was "to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, . . . to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination." *New York, N.H. & H.R. Co. v. ICC*, 200 U.S. 361, 391, 26 S.Ct. 272, 50 L.Ed. 515 (1906). Under the ICA, a carrier could charge a shipper only those rates incorporated in a tariff that the carrier had filed with the ICC. The rate became effective after it was filed unless the rate or the practice employed by the carrier was deemed unreasonable by the ICC. The requirement that carriers collect only the rate they filed, or that the ICC established, became commonly referred to as the "filed rate doctrine." The doctrine, as applied, also meant that private parties could not contract for a price other than the filed rate.

The Supreme Court first articulated the filed rate doctrine as applied to the power industry in 1951 in *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52, 71 S.Ct. 692, 95 L.Ed. 912 (1951). The Court held that rates established in power sales contracts filed with and accepted by FERC's predecessor, the Federal Power Commission, were not only binding on the parties, but on the federal courts. *Id.* In short, under the filed rate doctrine, once rates have been accepted for filing under FPA § 205, utilities must adhere to those rates absent a waiver. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981). The rate filed by the wholesale seller of electricity or fixed by FERC is the only lawful charge and "[d]eviation from it is not permitted upon any pretext." *AT & T v. Central Office Telephone, Inc.*, 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998). Unless the filed rates are challenged administratively, the filed rates become the legal rates. If the rates are challenged, then FERC decides whether the rates are "just and reasonable" and not "unduly discriminatory." Parties may challenge FERC's resolution of these issues in a petition for review before the appropriate United States Court of Appeals. 16 U.S.C. § 8251(b). However, appellate review is deferential. *See City of Seattle v. FERC*, 923 F.2d 713, 715 (9th Cir.1991).

With a fixed rate tariff, the review process is relatively straightforward. A wholesaler would file a rate, which would become the legal rate unless challenged. If FERC determined that the rate was not "just and reasonable" after a challenge, then it would order refunds.

However, approximately a decade ago, companies began to file market-based tariffs that did not specify the precise rate to be charged. As a result, FERC then departed from its historical policy of basing rates upon the cost of providing service plus a fair return on invested capital, and began approving market-based tariffs.

California contends that the market-based tariff system approved by FERC in this case violates the FPA because it relies on unfiled, privately negotiated rates to satisfy statutory rate filing requirements, and that this cannot be sustained even when the agency has made a prior determination that market forces will drive rights into a zone of reasonableness.

In considering FERC's tariff-approving authority, the Supreme Court has emphasized "that the just and reasonable standard does not compel the Commission to use any single pricing formula. . . ." *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Co.*, 498 U.S. 211, 224, 111 S.Ct. 615, 112 L.Ed.2d 636 (1991) (discussing the "just and reasonable" requirement in the natural gas context). The Court has recognized that the "just and reasonable" requirement accords FERC "broad rate-making authority." *Id.*

The use of market-based tariffs was first approved in the natural gas context, *see Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C.Cir.1993), then as to wholesale sellers of electricity, *see Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 365 (D.C.Cir.1998). However, approval of such tariffs was conditioned on the existence of a competitive market. *Id.* Thus, market-based applications were approved only if FERC made a finding that "the seller and its affiliates [did] not have, or adequately [had] mitigated, market power." *Id.*[4] The principle justifying this approach as "just and reasonable" was that "[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C.Cir.1990).

In support of its contention that market-based tariffs are impermissible under the FPA, California relies on *MCI Telecommunications Corp. v. AT & T*, 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) and *Maislin Indus. US v. Primary Steel Inc.*, 497 U.S. 116, 132, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). In *MCI*, the Supreme Court held that the FCC could not eliminate rate-filing requirements for any class of carrier, even when necessary to promote competitive markets. In *Maislin*, the Court held that the ICC could not allow common carriers to charge unfiled, privately negotiated rates lower than the filed rates, even when the carriers were in highly competitive markets. *Id.* at 132-33, 110 S.Ct. 2759. As the Court stated in *Maislin*, the existence of a competitive market "cannot provide the ICC authority to alter well-established statutory filed rate requirements." *Id.* at 135, 110 S.Ct. 2759.

However, the regulatory scheme before us is different from those under consideration in *MCI* and *Maislin*. The agencies in *MCI* and *Maislin* relied on market forces alone in approving market-based tariffs. In contrast, FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with strict reporting requirements to ensure that the rate is "just and reasonable" and that markets are not subject to manipulation. Here, FERC required the wholesale seller to file a market analysis every four months, and quarterly reports summarizing its transactions during the preceding three months. These transaction summaries include both long and short-term contracts, purportedly with reports of some sales for intervals as small as ten minutes. FERC has affirmed in its presentation before us that it is not contending that approval of a market-based tariff based on market forces alone would comply with the FPA or the filed rate doctrine. Rather, the crucial difference between *MCI/ Maislin* and the present circumstances is the dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements. Given this, FERC argues that its market-based tariff does not run afoul of *MCI* or *Maislin*, and we agree.

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[4] FERC defines market power as a seller's ability to "significantly influence price in the market by withholding service and excluding competitors for a significant period of time." *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 at 61,777 (1989).

California argues that different reporting requirements should have been established. However, Congress specified that filings be "within such time and within such form" and under "such rules and regulations as the Commission may prescribe," 16 U.S.C. § 824d(c). Thus, so long as FERC has approved a tariff within the scope of its FPA authority, it has broad discretion to establish effective reporting requirements for administration of the tariff.

For all of these reasons, California's facial challenge to market-based tariffs fails.[5]

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[5] FERC argues that California's facial challenge to market-based tariffs is an impermissible collateral attack on FERC's decision in *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120. We disagree. Both the nature and scope of California's challenge to FERC's system of market-based rates differ significantly from previous narrow challenges to particular aspects of FERC's system. Moreover, while California was a late intervenor in a pertinent proceeding, it was foreclosed from fully litigating the claims at issue in this case. Thus, FERC erred in dismissing California's claims as an impermissible collateral attack on prior Commission orders. As indicated above, however, we agree with FERC that both the Congressionally enacted statutory scheme, and the

III

Our determination that market-based tariffs do not, *per se*, violate the FPA does not end our inquiry. California also argues that, even if market-based tariffs are lawful in concept, FERC failed to administer the tariffs in accordance with their terms and abused its discretion in limiting available remedies for regulatory violations. On these issues, we agree with California.

As we have discussed, there is nothing inherent in the general concept of a market-based tariff that violates the FPA; however, as *MCI* and *Maislin* affirm, a market-based tariff cannot be structured so as to virtually deregulate an industry and remove it from statutorily required oversight. The structure of the tariff complied with the FPA, so long as it was coupled with enforceable post-approval reporting that would enable FERC to determine whether the rates were "just and reasonable" and whether market forces were truly determining the price.

For example, in *Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305, FERC emphasized that transaction-specific reporting "is necessary so that the marketer's rates will be on file as required by section 205(c) of the FPA, to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power." Similarly, FERC has stated that transaction-specific data is the "minimum needed for market monitoring purposes." *Revised Public Utility Filing Requirements*, 99 FERC ¶ 61,107 (2002).

Despite the crucial nature of the transactional reporting, as FERC admits, the reporting requirements were not followed in the period at issue. Indeed, noncompliance with FERC's reporting requirements was rampant throughout California's energy crisis. FERC itself has acknowledged that during the height of the energy crisis the quarterly reports of several major

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pertinent case law, indicate that market-based tariffs do not *per se* violate the FPA.

wholesalers failed to include the transaction-specific data through which the agency at least theoretically could have monitored the California energy market:

> The quarterly reports submitted . . . by a number of the respondents do not comply with [the] requirements. For example, Williams Energy Marketing and Trading Company, Dynegy Power Marketing, Inc., Mirant Americas Energy Marketing, LP and Reliant Energy Services, Inc. filed aggregated data in their transaction reports for the fourth quarter 2000 and all four quarters of 2001. . . . Similarly, any other filings that report aggregate data did not comply with the reporting requirements.

State of California ex rel. Bill Lockyer, Attorney General of the State of California v. British Columbia Power Exchange Corp. et al., 99 FERC ¶ 61,247 at 62,066 (2002).

Thus, the very mechanism that distinguished FERC's tariff from those prohibited by the Supreme Court in *MCI* and *Maislin* was, for all practical purposes, non-existent while energy prices skyrocketed and rolling brown-outs threatened California's businesses and citizens.

Despite the promise of truly competitive market-based rates, the California energy market was subjected to artificial manipulation on a massive scale. With FERC abdicating its regulatory responsibility, California consumers were subjected to a variety of market machinations, such as "round trip trades"[6] and "hockey-stick bidding,"[7] coupled with manipulative corporate strategies, such as those nicknamed "FatBoy," "Get Shorty," and "Death Star."[8]

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[6] Round-trip trades are a mechanism for market manipulation through which an entity attempts to inflate transaction volume through the continuous and frequent sale of a particular commodity. The trades create the appearance of increased revenue and demand, but in actuality produce no net income.

[7] Hockey-stick bidding is a fraudulent practice whereby an extremely high price is demanded for a small portion of a product in light of known inelastic demand (as was the case for energy in California during the energy crisis).

However, despite the integral nature of the reporting requirements to an effective market-based tariff, and despite the patent failure of many of the affected companies to provide even minimal reporting, FERC's position here is that violation of tariff reporting requirements is merely a technical "compliance issue," and it is therefore without authority to order refunds retroactively based on reporting failures.

FERC misapprehends its legal authority in this context. In fact, FERC possesses broad remedial authority to address anti-competitive behavior. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 686 (D.C. Cir.2000). Indeed, in the past, FERC has ordered refunds in instances where utilities violated FPA § 205, either by violating the terms of an accepted rate, or by charging rates without first seeking approval under FPA § 205. In *The Washington Water Power Co.*, 83 FERC ¶ 61,282 (1998), FERC ordered profits disgorged because a regulated utility had violated posting requirements and conferred undue preferences on its marketing affiliate. To do otherwise would allow companies to flout our regulations, and overcharge consumers with impunity." 24 FERC ¶ 61,199 at 61,461, *reh'g order*, 24 FERC ¶ 61,380, *reh'g denied*, 25 FERC ¶ 61,308 (1983).

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[8] These monikers are strategies referred to in now notorious internal memos at the Enron Corporation that were released to the public by FERC. "FatBoy" refers to a strategy through which the Houston-based energy company allegedly withheld previously agreed-to deliveries of power so it could sell the energy at a higher price on the spot market. To execute this, the company would over-schedule its load; supply only enough power to cover the inflated schedule; and thus leave extra supply in the market, for which the ISO would pay the company. Via the "Get Shorty" strategy, traders were able to fabricate and sell emergency back-up power (known as ancillary services) to the ISO, receive payment, then cancel the schedules and cover their commitments by purchasing through a cheaper market closer to the time of delivery. Under the "Death Star" strategy, Enron allegedly sought to be paid "for moving energy to relieve congestion without actually moving any energy or relieving any congestion." *See 'FatBoy,' 'Get Shorty,' and 'Inc-Ing': A Look at Enron Trading Practices*, May 13, 2002, Electric Utility Week 7, 2002 WL 10510230; *see also Enron Memos Put FERC in the Hot Seat; All Western Sellers Will be Grilled*, May 13, 2002, Electric Utility Week 1, 2002 WL 10510221 (noting, *inter alia*, that while Enron's monikers may have been unique, its practices in the California energy market were not).

Here, because the reporting requirements were an integral part of a market-based tariff that could pass legal muster, FERC cannot dismiss the requirements as mere punctilio. If the ability to monitor the market, or gauge the "just and reasonable" nature of the rates is eliminated, then effective federal regulation is removed altogether. Without the required filings, neither FERC nor any affected party may challenge the rate. Pragmatically, under such circumstances, there is no filed tariff in place at all. The power to order retroactive refunds when a company's non-compliance has been so egregious that it eviscerates the tariff is inherent in FERC's authority to approve a market-based tariff in the first instance. FERC may elect not to exercise its remedial discretion by requiring refunds, but it unquestionably has the power to do so. In fact, if no retroactive refunds were legally available, then the refund mechanism under a market-based tariff would be illusory. Parties aggrieved by the illegal rate would have no FERC remedy, and the filed rate doctrine would preclude a direct action against the offending seller. That result does not comport with the underlying theory or the regulatory structure established by the FPA.

One of the animating ideas behind the FPA and the filed rate doctrine was, as we have discussed, the prevention of price discrimination and the imposition of unjust and unreasonable rates by requiring that all customers receive the same published rate. As the Supreme Court noted in *Maislin*, the purpose of the filed rate doctrine is undermined when it is impossible to review the reasonableness of privately negotiated, unfiled rates. 497 U.S. at 132, 110 S.Ct. 2759. If the tariff is interpreted as FERC urges here, then the tariff runs afoul of *Maislin*, the filed rate doctrine, and the FPA. If, on the other hand, we view the reporting requirements as integral to the tariff, with implied enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory rates, then a market-based tariff is permitted. FERC cannot have it both ways. The FPA does not permit it.

FERC argues that we owe it deference under *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) and that as a result, we cannot reach a contrary conclusion about the limits of its remedial authority. However, *Chevron* does not require blind deference; the Supreme Court has articulated a more thorough and nuanced approach. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). Under *Chevron*, we must consider first "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'" *Brown & Williamson*, 529 U.S. at 132, 120 S.Ct. 1291 (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778).

As we have often stated, "[w]hen we look to the plain language of a statute in order to interpret its meaning, we do more than view words or subsections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole." *United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir.1999) (quoting *Carpenters Health & Welfare Trust Funds v. Robertson (In re Rufener Constr.)*, 53 F.3d 1064, 1067 (9th Cir.1995)).

Thus, as the Supreme Court emphasized in *Brown & Williamson*, we must analyze the provision in the context of the entire governing statute, *see id.*, presuming congressional intent to create a "symmetrical and coherent regulatory scheme." *Id.* at 133, 120 S.Ct. 1291 (quoting

Gustafson v. Alloyd Co., 513 U.S. 561, 569, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995)).

In addition, "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision." *Id.* If, after conducting such an analysis, we conclude that Congress has not addressed the issue, we "must respect the agency's construction of the statute so long as it is permissible." *Id.* at 132, 120 S.Ct. 1291 (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999)).

In this instance, our statutory construction of FERC's authority is dictated by the plain language and words of the Federal Power Act, and by a common sense application of the principles underlying the FPA. To cabin FERC's section 205 refund authority under the circumstances of this case would be manifestly contrary to the fundamental purpose and structure of the FPA, and cannot be sustained under *Maislin* and *MCI*.

FERC's construed limitations on its own authority are not supported by a careful examination of the FPA. Either the quarterly report requirement is an integral part of the authorizations under § 205, in which case violations of the requirement cannot be dismissed as mere "compliance issue[s]," or the reporting requirement is a mere compliance issue, in which case, where FERC neglects to require the filing of the reports, and thus does not engage in an active ongoing review, the only arguably serious regulatory screening that exists is FERC's initial determination with respect to a seller's market power – a determination that may bear little or no relation to the realities of subsequent circumstances.

It is true that pending a § 205 investigation, FERC may suspend a rate for a period of up to five months, at which point the proposed rate becomes effective subject to a refund if FERC ultimately determines the initially-suspended rate to be unreasonable. However, when the § 205 determination consists of a blanket approval of market-based rates determined solely (at least at the outset) on a lack of market power, the purgatorial period contemplated by the statute does not exist. Either FERC determines an entity has market power and thus is unauthorized to sell at market-based rates, or FERC determines an entity lacks market power and is thus authorized to sell at market-based rates. In the case of the former, there is no market-based rate authority whatsoever subject to the remedies in § 205. In the case of the latter, because the "rates" are already "approved," the only remedies are prospective, and, for that matter, unavailable for a period of 60 days pursuant to § 206(b). In other words, the § 205(e) refund remedy is, practically speaking, eliminated under the scheme as FERC would have us interpret it. Such an interpretation comports neither with the statutory text nor with the Act's "primary purpose" of protecting consumers. So while we agree with FERC that market-based tariffs are not *per se* invalid under the FPA, it is clearly incorrect to conclude that the reporting requirements are anything less than essential to a valid administration of the market-based system at issue in this case.

As we have noted, FERC itself has recognized that it possesses the authority to impose retroactive refunds for § 205 violations in *Washington Water Power and Delmarva Power*. Here, the reporting requirements were an integral part of a market-based tariff that could pass legal muster. The FPA cannot be construed to immunize those who overcharge and manipulate markets in violation of the FPA. In short, the governing statute can be easily construed in accordance with the principles articulated by the Supreme Court in *Brown & Williamson*. Therefore, FERC's *Chevron* argument necessarily fails.

For these reasons, we agree with California that FERC improperly concluded that retroactive refunds were not legally available. Although California urges us to order refunds, we decline to do so. It is more appropriate for FERC to reconsider its remedial options in the first instance. We therefore grant the petition and remand to FERC for further proceedings consistent with this opinion.

PETITION GRANTED; REMANDED.

FEDERAL ENERGY REGULATORY COMMISSION

Commission Opinions, Orders and Notices

[¶ 61,247]

Docket No. EL02-71-000

State of California, *ex rel.* Bill Lockyer,
Attorney General of the State of California,
Complainant

v.

British Columbia Power Exchange Corporation,
Coral Power, LLC, Dynegy Power Marketing, Inc.,
Enron Power Marketing, Inc., Mirant Americas
Energy Marketing, LP, Reliant Energy Services, Inc.,
Williams Energy Marketing & Trading Company;

All Other Public Utility Sellers of Energy and
Ancillary Services to the California Energy
Resources Scheduling Division of the California
Department of Water Resources; and

All Other Public Utility Sellers of Energy and
Ancillary Services into Markets Operated by the
California Power Exchange and California
Independent System Operator,
Respondents

ORDER ON COMPLAINT

(Issued May 31, 2002)

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, Linda Breathitt, and Nora Mead Brownell.

On March 20, 2002, the State of California, *ex rel.* Bill Lockyer, Attorney General of the State of California (Attorney General), filed a complaint alleging that generators and marketers selling power into markets operated by the California Independent System Operator (ISO) and California Power Exchange (PX), as well as those making spot market sales of energy to the California Energy Resources Scheduling Division of the California Department of Water Resources (CERS), have failed to file their rates as required by section 205(c) of the Federal Power Act (FPA), 16 U.S.C. § 824d (c) (1994). Specifically, the Attorney General alleges that: (1) the section 205(c) filing requirement is not met by the Commission requirement that power marketers file (a) rate schedules that simply acknowledge that sales will be made at rates established by agreement between buyer and seller and (b) quarterly transaction reports; and (2) the quarterly reports actually filed by power marketers do not contain transaction-specific information about their sales and purchases at market-based rates as required by section 205(c) and Commission directives.

As discussed below, the Commission dismisses the complaint insofar as it constitutes a collateral attack on prior Commission orders, and denies the complaint with respect to the allegations that the Commission's market-based rate filing requirements violate the FPA as a matter of law. With respect to the allegations that marketers' quarterly reports are not in compliance with the Commission's reporting requirements, the Commission directs public utility marketers that made short-term sales at market-based rates to CERS or into the PX or ISO markets since October 2, 2000, and that have not complied with the Commission's reporting requirements, *i.e.*, have not filed quarterly reports containing transaction-specific information with respect to their sales and purchases at market-based rates, to file new quarterly transaction reports for the period beginning October 2, 2000 and up to the date of this order. The Commission denies the Attorney General's request for other remedies.

This order is in the public interest because it elucidates the statutory requirements of the FPA and provides regulatory certainty regarding the filing and reporting requirements on which market-based rates are conditioned.

I. Complaint

The Attorney General argues that the market-based rate schedules filed by sellers in the California markets do not satisfy the requirement of section 205(c) of the FPA that all rates must be filed with the Commission and published for public review.[1] He argues that the filing of rates is essential to the Commission's functions and, without filed rates, the Commission cannot carry out its statutory duty to ensure that all rates charged for jurisdictional services are just and reasonable.[2]

He states that sellers with market-based rate authority typically file a *pro forma* rate schedule stating that "all sales shall be made at rates established by agreement between [seller] and purchaser" and that "all other terms and conditions shall be established by agreement between [seller] and the purchaser."[3] He then argues that this "vague description" does not provide the public with advanced notice of the rate charged by a seller, nor the Commission with an opportunity to review the rates charged before they go into effect.[4] Further, he argues that, without filed rates, customers and competitors are unable to challenge wholesale power rates as unreasonable or discriminatory.

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[1] Section 205(c) provides that:

> [u]nder such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

[2] *Citing MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229-231 (1994) (*MCI*); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 132-33 (1990) (*Maislin*).

[3] Complaint at 7.

[4] *Electrical District No. 1 v. FERC*, 774 F.2d 490, 492 (D.C. Cir. 1985); *Public Service Company of New Mexico v. FERC*, 832 F.2d 1201, 1222-25 (10th Cir. 1987); *Columbia Gas Transmission Corporation v. FERC*, 831 F.2d 1135, 1140-41 (D.C. Cir. 1987).

He also notes that, when granting market-based rate authority to a seller, the Commission makes a finding in advance of any sales that any rate negotiated pursuant to the seller's tariff is just and reasonable. According to the Attorney General, this finding cannot be reconciled with the section 205 filing requirement, which is designed to ensure that the Commission has an opportunity in every instance to judge the reasonableness of rates before they go into effect. Further, he argues that market-based rates, which fluctuate widely and rapidly, cannot be likened to a "formula" rate, which courts have found to be acceptable.

According to the Attorney General, the quarterly reporting requirement that sellers identify short-term purchases and sales during the previous quarter does not comply with the section 205(c) filing requirement. He argues that such after-the-fact reporting does not provide sufficient notice to the public and does not allow the Commission the opportunity to review the rates for reasonableness before they go into effect. Instead, consumers must file a complaint pursuant to section 206 of the FPA to challenge the legality of rates being charged in the marketplace. He contends that the complaint procedure is not fully effective because it places the burden of proof on the complainant, and the Commission can order refunds only if it acts before the rate goes into effect.

The Attorney General states that he does not object to market-based pricing, provided that negotiated rates do not exceed a price cap established by the Commission to ensure that rates are just and reasonable.

The Attorney General further argues that the Commission does not have the authority to waive (or modify out of existence) the statutory requirement that all rates be filed. He notes that, in *MCI*, the Supreme Court stated that "rate filings are . . . the essential characteristic of a regulated industry" and that the tariff requirement "was

Congress's chosen means of preventing unreasonableness and discrimination in charges."[5] He argues that, in both *MCI* and *Maislin*, the Supreme Court refused to allow an agency to do away with a filing requirement. In *MCI*, the Supreme Court explained that, where Congress has chosen a scheme of rate regulation that depends on the filing and publication of rates, a desire to increase competition does not justify the promulgation of rules that "alter the well-established statutory filed rate requirements."[6] The Attorney General argues that the Commission has exceeded its statutory authority, and that the quarterly reporting requirement is an unacceptable substitute for filed rates that allow an agency to review in advance the reasonableness of the rates charged for electricity.

Alternatively, the Attorney General argues that, if the filing of quarterly after-the-fact transactions reports satisfies the section 205(c) filing requirement, the actual reports filed by sellers are so deficient that they violate section 205(c) as well as the filing requirements established by the Commission. He states that the Commission has consistently required sellers with market-based rate authority to report their short-term sales and purchases on a *transaction-specific* basis to ensure that their rates will be on file, to evaluate the reasonableness of those charges, and to monitor the seller's ability to exercise market power.[7] The Attorney General contends that this condition is mandated by the section 205(c) requirement that rates for any sale of wholesale power must be filed and posted for public inspection. Further, he contends that the filing of transaction-specific information is an express condition of the grant of market-based rate authority.[8]

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[5] *MCI*, 512 U.S. at 229-231.

[6] *Id.*, at 234.

[7] *Citing Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305 at p. 62,406 (1993) (*EPMI I*), *on reh'g*, 66 FERC ¶ 61,244 (1994) (*EPMI II*).

[8] *Citing, e.g., Ormond Beach Power Generation, L.L.C.*, 83 FERC ¶ 61,306 at p. 62,259 (1998); *Citizens Power & Light Corporation*, 48 FERC ¶ 61,210 (1989) (*Citizens*).

According to the Attorney General, sellers must report for each transaction: the buyer's or seller's name; a brief description of the service; the delivery point(s) for each service; the price of each service; quantities to be served or purchased; the duration of the transaction; and any other attribute of the product being bought or sold which contribute to its market value.[9] He argues that, despite requests by market participants to ease the requirement, the Commission has refused to deviate from it. He contends that, for example, in *EPMI I*, the Commission denied a request to report transactions on an aggregate basis, without identifying the terms of specific transactions or counter-parties.[10]

However, according to the Attorney General, sellers routinely report aggregated data, typically listing the total number of megawatts sold, along with the minimum and maximum prices charged, for the entire quarter. In particular, he complains that sellers have failed to file transaction-specific data relating to their sales of energy into the ISO and PX, as well as their spot market sales to CERS.[11] He contends that the Commission itself has acknowledged the failure of market-based sellers to report their rates, making it "very difficult for the Commission to carry out its duties under the FPA."[12]

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[9] *Citing Intercoast Power Marketing Company*, 68 FERC ¶ 61,248, at p. 62,134 (1994).

[10] *EPMI I*, 65 FERC at p. 62,406. *Also citing, EPMI II*, 66 FERC at p. 61,599; and *National Electric Associates LP*, 50 FERC ¶ 61,378 (1990).

[11] Appendix A to the Complaint provides a spreadsheet that identifies entities that sold electric power on a short-term basis to CERS from January 18 to October 31, 2001 and the number of transactions that CERS entered into with each seller. According to the Attorney General, none of the quarterly transaction reports for the first three quarters of 2001 filed by the relevant sellers provided transaction-specific information regarding sales to CERS.

[12] *Revised Public Utility Filing Requirements, FERC Statutes and Regulations*, ¶ 32,554 at p. 34,072 (2001). *Also citing San Diego Gas & Electric Company*, 95 FERC ¶ 61,418 at p. 62,565 (2001) (noting failure of marketer to report transaction in its quarterly report); *Notice to All*

To remedy the alleged violations, the Attorney General asks that the Commission: (1) require defendants to comply prospectively with the section 205(c) requirement; (2) require defendants to provide transaction-specific data to the Commission on all short-term sales to the ISO, PX and CERS for the calendar years 2000-2001; (3) to the extent that rates for short-term power sold to the ISO, PX or CERS are found to exceed just and reasonable levels, require defendants to refund the difference between the rate charged and a just and reasonable, rate, plus interest; (4) issue a declaration that defendants have failed to file their rates in accordance with the filed-rate doctrine; and (5) institute proceedings to determine whether any other relief is necessary, including revocation of defendants' market-based rate authority.

II. Answers, Protests and Motions to Dismiss

A. *Motions to Dismiss*

Several respondents argue that the complaint is procedurally defective. TransCanada, Exelon, IDACORP, Puget and Avista complain that they were not properly served. A number of entities contend that the complaint is too vague and fails to satisfy the pleading requirements of 18 C.F.R. § 385.206.[13] For instance, they contend that the complaint fails to identify what transactions are at issue, what time period the transactions took place, what purchasers are paying for those transactions, and which sellers the complaint is targeting.

Certain parties identified in the complaint's appendices intervened to argue that they should be dismissed because they do not fall within the scope of the complaint. APX contends that because it does not own, operate or

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Jurisdictional Sellers and All Non-Jurisdictional Sellers in the West, Docket No. PA02-2-000 (March 5, 2002) (stating that Commission staff has reviewed quarterly reports filed by sellers participating in western power markets and "determined that the information contained in the reports is not useful").

[13] *See e.g.*, Answers and Protests of PS Colorado, Pinnacle, PacifiCorp, PPM, TransCanada, Exelon, and Puget.

control generation facilities, or sell power or ancillary services or take title to such products, it does not engage in any of the activities that are the subject of the complaint. City of Seattle argues that because it is a non-public utility under FPA § 201, it is not subject to the rate-filing requirements of FPA § 205 that form the basis of the complaint. City of Tacoma makes a similar argument, and also argues that it should be dismissed from the complaint because any energy sales it made to the ISO or to the CERS during the relevant time period were not made into the ISO spot market, were not transacted in the State of California, and were not accomplished through use of any part of the ISO's interstate transmission grid. Sunrise contends that it has not made any sales at market-based prices, and therefore, its activities do not fall within the scope of the Attorney General's complaint. Nevada Power, Sierra Pacific, PNM and Puget/Avista argue that they should be dismissed as their sales were made (and reported) pursuant to the Western Systems Power Pool (WSPP) Agreement and were not made pursuant to their market-based rate authority.

B. *Legality of the Market-Based Rates Program*

Nearly all of the respondents argue that the complaint should be dismissed as a collateral attack on prior Commission and court decisions relating to the Commission's market-based rate authority and procedures.[14] They contend that the complaint echoes similar requests for the Commission to overturn its market-based rate system and return to cost-based regulation which the Commission has already rejected in its California investigation orders.[15]

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[14] *See* Answers and Protests of GWF, EMMT, EPSA/WPTF, Enron, Williams, MLCS, PPM, Duke Energy, AES, PS Colorado, Pinnacle, PPL, Sierra, Powerex, Sempra, IDACORP, PNM, TransCanada, Mirant, Exelon, Strategic Energy, Avista, Reliant, Idaho Power, Allegheny, CAC/EPUC, Portland, PGET, EPME, Wellhead companies, Puget, TransAlta and Coral.

[15] *Citing San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 95 FERC ¶ 61,148 at p. 62,558 (2001); *San Diego*

In addition, they argue that in those proceedings the Commission already rejected the argument advanced in the complaint that the FPA requires advance notice of the actual numerical market-based rates.[16] They point out that prior challenges like those made by the Attorney General to the legality of the Commission's system of relying on markets to ensure just and reasonable rates under the FPA have been rebuffed by the courts.[17] They further argue that the Commission has rejected calls similar to those made by the Attorney General for pre-approval of all individual market-based rate transactions, on the ground that such sales made pursuant to a previously accepted market-based rate tariff are, in effect, pre-authorized pursuant to the acceptance for filing of the market-based rate tariff.[18] They also argue that the Commission has already considered and rejected the contention that the Commission's filing requirements associated with its market-based rate program conflict with *Maislin* and *MCI*.[19]

Numerous parties also contend that the complaint attempts to circumvent various rulings made by the Commission in prior decisions defining the scope of its investigation into the California wholesale electricity market.[20]

Gas & Electric Co. v. Sellers of Energy and Ancillary Services, 93 FERC ¶ 61,294 at p. 62,008 (2000).

[16] *Citing San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 61,120 at p. 61,506 n.31 (2001).

[17] *Citing Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993).

[18] *Citing PacifiCorp Power Marketing, Inc.*, 98 FERC ¶ 61,108 (2002); GWF Energy, LLC, 98 FERC ¶ 61,330 (2002).

[19] *Citing Southern Company Energy Marketing, L.P., et al.*, 86 FERC ¶ 61,131 at p. 61,460 n.41 (1999), *aff'd sub nom., Power Co. of America v. FERC*, 245 F.3d 839 (D.C. Cir. 2001); *Koch Gateway Pipeline Co.*, 66 FERC ¶ 61,385 (1994).

[20] *See e.g.*, Answers and Protests of GWF, EMMT, EPSA/WPTF, Enron, Williams, MLCS, PPM, Duke Energy, AES, PS Colorado, Pinnacle, PPL, Sierra, Powerex, Sempra, IDACORP, PNM, Trans-

They point out that in its order instituting the investigation into the justness and reasonableness of sales into the PX and ISO markets, the Commission established a refund effective date of October 2, 2000,[21] and has repeatedly rejected requests to extend refund liability prior to that date as well as to bilateral transactions outside of the ISO and PX spot markets.[22] The parties argue that, to the extent the Attorney General's complaint seeks to relitigate the Commission's holdings to restrict refund liability to spot-market ISO and PX sales after October 2, 2000, the complaint constitutes an improper collateral attack on the Commission's prior orders, and should be dismissed.

In addition, several entities contend that the complaint constitutes a collateral attack on prior Commission orders granting their individual requests for market-based rate authority.[23] They argue that since the Attorney General did not contest the Commission's legal authority to grant market-based rate authority when they applied for and received that authority, any belated challenge to their market-based authority now constitutes a collateral attack on those long-final authorization orders.

C. *Alleged Deficiencies in Quarterly Reports Filed by Marketers*

As noted above, the Attorney General argues, in the alternative, that the actual quarterly transaction reports filed by sellers in the ISO and PX markets, and to CERS, are deficient because they do not contain transaction-

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Canada, Mirant, Exelon, Strategic Energy, Avista, Reliant and Idaho Power.

[21] *Citing San Diego Gas & Electric Co., et al.*, 92 FERC ¶ 61,172 at p. 61,608 (2000).

[22] *Citing San Diego Gas & Electric Co., et al.*, 97 FERC ¶ 61,275 at pp. 62,195 and 62,199 (2001); *San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 61,120 at pp. 61,505 and 515 (2001); *San Diego Gas & Electric Co., et al.*, 93 FERC ¶ 61,121 at p. 61,371 (2000).

[23] *See e.g.*, Answers and Protests of Reliant, Williams, Dynegy, Idaho Power, Duke Energy, AES, PS Colorado, Pinnacle and Wellhead companies.

specific information and therefore violate section 205(c) of the FPA and the Commission's filing requirements. Numerous entities respond that the complaint does not present any evidence of specific deficiencies in their particular quarterly reports, and argue that their reports in fact satisfy the Commission's requirements.

Some entities claim that they have complied by submitting transaction-specific information in their quarterly reports.[24] They believe that the Attorney General is mistaken in including them in the complaint. Some further argue that, while they provided transaction-specific information with respect to bilateral transactions, they were not required to separately report each sale to the ISO and PX because: (1) APX, as scheduler, was responsible for such reporting; (2) it is onerous to require separate reporting of each ten-minute clearing interval for the ISO and hour-interval for the PX, especially considering that the information is available through the ISO and PX; and (3) the Commission requirement that marketers report the "dates of service" for each transaction does not contemplate the reporting of sales at each ten-minute clearing interval, nor hourly for the PX.

Numerous parties note that a significant number of parties execute sales under the WSPP Agreement.[25] They state that the WSPP Agreement has been approved by the Commission, and is a completely separate tariff from the standard market-based rate tariffs, which is the focus of the Attorney General's complaint. Further, WSPP sales are reported in quarterly reports that are available for public inspection. Therefore, the parties conclude that sales made pursuant to the WSPP Agreement are not subject to the complaint.

Other entities argue that the Commission's requirements allow for the reporting of aggregate transactions by purchaser and type of transaction.[26] They state that the Commission orders approving their applications for market-based rates do not require them to report on a "transaction-specific basis." Rather, they point to language in the orders accepting their market-based rate tariffs that required them to report transactions in "quarterly transaction summaries of specific sales" or to file "quarterly reports detailing [its] purchase and sales transactions." They note that they have reported transactions in the same manner for years, and the Commission has not rejected their filings or otherwise objected to their format. They also claim to have relied on industry practice, "which generally does not include the details of each transaction in quarterly reports."[27]

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[24] *E.g.*, Fresno Cogen, TransAlta, Exelon, Avista, Puget, Strategic Energy, and BP.

[25] *E.g.*, Avista, Puget and PNM.

They argue that if any reporting violations have occurred, they have already been rectified, noting that the Commission required in Docket No. PA02-2-000 that all sellers file non-aggregated information on short-term energy sales for calender [*sic*] years 2000-2001. Further, they contend that, if the Attorney General believes the reporting requirements are insufficient, it should have raised the issues in the Commission's Notice of Proposed Rulemaking, Revised Public Utility Requirements.[28] Williams argues that the NOPR did not conclude that the quarterly reports were legally deficient (as implied by the Attorney General), but rather indicates that variations in the reporting format have made it very difficult for the Commission to carry out its responsibilities.

El Paso (amongst others) argues that, because the Commission has not codified the reporting requirements, marketers cannot be held to standards set in orders directed at individual entities, such as *EPMI I*, unless such orders were docketed for all marketers. Rather, according to El Paso, the Commission cannot assess a seller's compliance without identifying the particular reporting requirements established for that seller and reviewing that seller's submissions in light of those reporting requirements. El Paso and others[29] argue that, nonetheless, the Attorney General misplaces his reliance on the Commission's decision in *EPMI I.* They argue that in *EPMI I* the market-based rate applicant, Enron, did not request to aggregate selected portions of its transaction data, *e.g.*, to aggregate all sales of a given type to a given counter-party. Rather, according to the respondents, Enron made – and the Commission denied – a request to aggregate all of the data, *e.g.*, without identifying the counter-parties or terms of individual transactions.[30] They claim that, subsequent to the decision, Enron did aggregate transactions by counter-party and type of transaction in its quarterly reports, and that the reports were accepted for filing by the Commission. They also argue that, since *EPMI I*, the Commission has not directed marketers to report transaction specific data, even where it has noted that a seller was aggregating sales prices in quarterly reports. *Duke Energy Moss Landing, LLC*, 86 FERC ¶ 61,187 at pp. 61,656-57 (1999) (*Moss Landing*).

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[26] *E.g.*, IDACORP, Williams, MLCS, PGET, PacifiCorp, EMMT, AES, Duke, Pinnacle, Portland, Coral, TransCanada, Sempra, Allegheny, Reliant and Dynegy.

[27] *E.g.*, Pinnacle at 17.

[28] *FERC Statutes & Regulations*, ¶ 32,554 (2001).

Williams and GWF argue that the Attorney General erroneously relies on a statement in a Staff notice in the Western Markets Investigation, Docket No. PA02-2-000, that information in the quarterly reports is not useful. They contend that whether the information is useful in the investigation is irrelevant to the issue of whether marketers have complied with the reporting requirements.

Respondents argue that, even if the quarterly reports do not comply with the Commission's requirements, refunds are not the proper remedy.[31] They argue that refunds are inappropriate because the reports are merely "informational filings" and do not affect whether rates are on file.[32] They contend that, while the Commission has the right to request additional information if it is dissatisfied with a report, failure to follow the Commission's filing instructions do not have any relevance to a claim for refunds.

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[29] *E.g.*, IDACORP, Portland, Sempra and Dynegy.

[30] *Citing*, *EPMI I*, 65 FERC at p. 62,404.

Certain respondents and intervenors also challenge the basis for the relief requested in the complaint. Many parties contend that the Attorney General's request that the Commission retroactively extend refund responsibility to transactions prior to the March 16, 2002 complaint is precluded under the FPA because section 206 only permits refunds to occur on a prospective basis.[33] Allegheny adds that the Commission had 60 days from the date of filing to act on quarterly reports and, having failed to do so, can not now impose refunds. Others argue that the proceedings in Docket No. EL00-95-000 *et al.* will determine refunds for spot sales to the ISO and PX for the period October 2, 2000 through June 20, 2001, and that the Commission has already determined that the CERS bilateral contracts are not subject to refund. Rather, they contend that the Attorney General is attempting to "bootstrap" an alleged violation of filing requirements into a finding of exercise of market power. They argue that, even if it were to present evidence of reporting violations, such violations do not establish that the underlying rates are unjust and unreasonable.

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[31] Williams, GWF, PS Colorado, IDACORP, PGET, El Paso, PacifiCorp, AES, Duke, Pinnacle, Exelon, Portland, Coral, Strategic Energy, TransCanada, and Sempra.

[32] *Citing GWF Energy LLC*, 97 FERC ¶ 61,297 (2001), *on rehearing*, 98 FERC ¶ 61,330 (2002) (*GWF*); *Southern Company Energy Marketing L.P.*, 86 FERC ¶ 61,131 at p. 61,459.

[33] *See e.g.*, Answers and Protests of GWF, Dynegy, Idaho Power, PacifiCorp, PPM, Duke Energy, PNM, TransCanada, Exelon, Avista, Mirant, IDACORP, Williams, Coral, PNM, Allegheny and Dynegy.

III. Notice of Filings and Interventions

Notice of the March 20 filing was published in the *Federal Register*, 67 Fed. Reg. 14707, with answers and motions to intervene and protests due on or before April 9, 2002. Interventions, answers, motions to dismiss and motions for summary disposition were filed by the entities listed in the Appendix. The CPUC, City of Tacoma and Aquila filed motions to intervene out-of-time. The Wellhead Companies filed a motion to accept one day out-of-time their answer and motion for summary disposition, explaining that they had technical difficulties in filing electronically.

Imperial Valley Resource Recovery Company, LLC (IVRRC) filed a motion for extension of time to answer in which it indicated that it was neither a named respondent in the complaint nor a public utility seller of energy or ancillary services, and therefore would not fall into the general class of unnamed respondents. In response, the Attorney General filed a pleading stating that IVRRC is not a respondent to the complaint.

On March 24, 2002, Californians for Renewable Energy, Inc. (CARE) filed a motion to consolidate this proceeding with the ongoing proceedings in Docket Nos. PA02-2-000, EL02-2-000, EL01-65-000 and EL00-95-000.[34] The Attorney General, Duke Energy, Dynegy and Competitive Supplier Group filed motions in opposition to CARE's request. On April 19, 2002, CARE filed an answer to the motions in opposition to its request.

On April 24, 2002, the Attorney General filed an answer in opposition to the motions to dismiss and motions for summary disposition. On May 9, 2002, PNM filed an answer to the Attorney General's answer.

On May 2 and 6, 2002, the Attorney General filed notices to withdraw, with prejudice, the filing of its complaint as to Calpine and Constellation, respectively.

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[34] We note that, while CARE has moved to consolidate, it has not moved to intervene in this proceeding.

Notices of the filings were issued, with comments due by May 10, 2002. Calpine filed an answer asking the Commission to confirm its withdrawal. CARE filed an answer and protest to the notices of withdrawal.

IV. Discussion

A. *Procedural Matters*

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2001), the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, given their interest, the early stage of the proceeding, and the absence of any undue prejudice or delay, we find good cause to grant the untimely, unopposed motions to intervene of CPUC, City of Tacoma and Aquila.

Pursuant to Rule 2008 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2008 (2001), the Commission accepts the Wellhead Companies' late answer and motion for summary judgement. According to their motion, because the electronic filing system failed to recognize a user account, filing of the pleading occurred at 5:02 p.m. on April 9, 2002 (the deadline for answers). As a result, the pleading was not accepted for filing until the morning of April 10. Given these circumstances, and the absence of undue prejudice or delay, we find good cause to grant the Wellhead Companies' motion.

We deny CARE's motion to consolidate this proceeding with other dockets listed in CARE's motion. The dockets raise distinct issues from those in the Attorney General's complaint and therefore no benefit is gained from consolidation.

Notwithstanding CARE's protest, we grant the withdrawal, with prejudice, of complaint with respect to Calpine and Constellation. In its filing, CARE challenges the fairness of the terms of the settlement, which is outside the scope of this complaint proceeding.

Finally, we reject PNM's May 9, 2002 filing as an impermissible answer to an answer.

B. *Motions to Dismiss*

Rule 206(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206(c) (2001) requires that a copy of a complaint must be served on the respondents, and provides that service can be accomplished by electronic mail in accordance with Rule 2010(f)(3), which permits electronic service to participants who have agreed to receive service via the specified electronic means. The Attorney General states that he has served the complaint on all parties to Docket Nos. EL00-95-000 *et al.* by e-mail, and by posting the complaint on the website of the California Department of Justice. He asks for a waiver of the requirements of Rule 206(c) to the extent that the above method of service is not in compliance with the Rule.

Exelon, IDACORP, Puget and Avista argue that service was defective because they did not agree to electronic service. They also argue that some parties that are not active in the EL00-95-000 docket may not have received simultaneous service. TransCanada contends that it never received service.

The Attorney General has not shown that respondents have agreed to accept service by e-mail, as required by Rules 206(c) and 2010(f)(3). However, we will grant the Attorney General's request for a waiver of the Rules. This is appropriate in light of the likelihood of overlap among parties to the current proceeding and those in Docket No. EL00-95-000. Further, no prejudice has been shown to result from the manner of service. However, in the future, we expect the Attorney General to only serve pleadings by electronic service to parties that have consented to such form of service. The motions to dismiss based on inadequacy of service are denied.

Further, we deny the motions to dismiss based on claims that the complaint fails to clearly state what transactions are at issue and does not specify allegations as to the conduct of specific parties. The complaint makes clear that it is challenging whether the Commission's market-based rate program legally satisfies the filing requirements of section 205(c) of the FPA. The complaint is also sufficiently clear that it challenges sellers' quarterly compliance with the Commission's reporting requirements when filing quarterly transaction reports. The Attorney General then identifies specific examples of what he alleges to be such violations of the reporting requirements. This level of detail suffices to put respondents on notice of the allegations against them.

We grant the motions to dismiss of APX and Sunrise because they did not make sales to the ISO, PX or CERS at market-based rates during the relevant time. Further, we grant the motions to dismiss of the Cities of Seattle and Tacoma because, while their sales are subject to the west-wide mitigation program established by the Commission,[35] they are governmental entities under section 201 of the FPA and the Commission has not required them to file the quarterly reports required of public utility sellers with market-based rates.[36] Therefore, they are not proper respondents to the complaint.

The Commission denies the motions to dismiss of Nevada Power, Sierra Pacific, PNM, Avista and Puget, claiming that they made sales under the WSPP Agreement. As discussed below, we find that sellers need not report transaction information that was previously and properly submitted by WSPP. However, it is not clear from their pleadings that their sales were made exclusively under the WSPP Agreement. For example, while PNM contends that all of its sales to CERS were made pursuant to the WSPP Agreement, it does not extend this claim to its sales in the ISO and PX markets.

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[35] *See San Diego Gas & Electric Co., et al.*, 95 FERC ¶ 61,418 (2001).

[36] The Attorney General, in his answer, at 4, acknowledges that APX, City of Seattle and City of Tacoma are not respondents.

C. *Legality of the Market-Based Rates Program*

The Attorney General challenges the legality of the current filing and reporting requirements for market-based rate tariffs under the FPA. Complaint at 5-16. The Attorney General argues that the filing requirements do not provide sufficient notice of the rate to be charged or permit advance Commission approval of actual prices, while the reporting requirements impermissibly shift the burden of proof. *Id.* These contentions rest largely on the view that the cost-of-service ratemaking model must control the reporting and review of market-based rates. *See* Complaint at 7 (faulting the current plan on grounds that it "do[es] not meet [the] fundamental requirements of the FPA" for cost-of-service or formula rates). These arguments were advanced and addressed in prior Commission orders, and thus the Complaint constitutes an impermissible collateral attack on those earlier Commission rulings. Compare Complaint at 5 (summarizing contentions) with *San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 61,120 at pp. 61,505-06 (2001) (July 25 Order) (summarizing similar contentions raised).[37] In addition, the Commission agrees with those parties who have pointed to other similarities between the complaint and arguments addressed in prior Commission orders. See *supra* nn. 14-18 and accompanying text. Accordingly, we dismiss this portion of the Complaint as an impermissible collateral attack on those orders.

Even if these arguments were not dismissed, they lack merit. The Complaint's view that only cost-based or formula rate models satisfy the statutory framework fundamentally misapprehends the Commission's ratemaking authority. The Complaint states that the tariffs on which "the market-based rates charged by California wholesalers" are based include neither the specific, numeric rates that characterize cost-of-service tariffs nor the clearly identified components that characterize a formula rate tariffs. *Id.* at 8-9. The Complaint then alleges that the notice requirements of the NGA and the FPA "dictate that [a] utility file either the actual rate to be charged or a [clearly-stated] formula." *Id.* at 9.

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[37] The July 25 Order is currently the subject of several pending appeals.

According to the Complaint, the absence of such elements renders market-based tariffs unlawful. But that allegation rests on a fallacious assumption: that because certain elements are necessary for a cost-based or formula rate tariff, they must also be found in a market-based rate tariff. However, nothing in the FPA supports that assumption, as the Act does not dictate the ratemaking methodology to be followed or the elements that must be included in a lawful tariff. Market-based rate tariffs are allowed under the FPA, and the current filing and reporting plan complies with the statutory conditions for assuring the lawfulness of such tariffs.

Market-based rates are permitted by the FPA. Use of market-based rates has been approved as satisfying the just and reasonable standard in certain circumstances. *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) (*LEPA*); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993). The prerequisite for approval of market-based rates is a finding that the seller lacks or has mitigated its market power in the relevant market. *LEPA*, 141 F.3d at 365; *see Grand Council of the Crees v. FERC*, 198 F.3d 950, 953 (D.C. Cir. 2000) (same). So long as a seller lacks market power and thus buyers have alternatives, market-based rates will meet the just and reasonable standard. *See Elizabethtown*, 10 F.3d at 871 ("Such market discipline provides strong reason to believe that [the pipeline] will be able to charge only a price that is 'just and reasonable' within the meaning of § 4 of the NGA."). This satisfies the FPA § 205(e) standard that use of market-based rates by a seller is just and reasonable.

As the "purpose of the filed rate doctrine is to assure effective Commission oversight of the rates at which power is sold," *City of Girard v. FERC*, 790 F.2d 919, 922 (D.C. Cir. 1986), filing requirements are tailored to allow the Commission to perform its oversight function. Filing requirements thus vary depending on the type of rates involved. For cost-of-service rate tariffs, there is "a bright-line insistence that a numerical rate be 'specified.'" *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 577 (D.C. Cir. 1990) (citations omitted). The need for a numerical rate does not apply, however, for rate formula tariffs, *id.* at 578, "because once we determine that the formula is just and reasonable, the protection against unreasonable rates is the fixed nature of the formula, which, so long as it is not changed, generally requires no further Commission monitoring." *Ocean State Power II*, 69 FERC ¶ 61,146 at p. 61,552 (1994) (footnote omitted).

In the case of market-based rates, which rest on a finding that a seller (and its affiliates) cannot exercise market power, the Commission requires quarterly filings to assure that the seller is not exercising market power in the relevant market. *See Transwestern*, 897 F.2d at 578-79 (Commission's role is to "mak[e] sure that the utility's monopoly power does not bring about rates that are materially worse for the customers than what they could get for themselves under competition"); *see also, e.g., EPMI I*, 65 FERC ¶ 61,305 at p. 62,406 (1993) ("informational filings are necessary so that the marketer's rates will be on file as required by Section 205(c) of the FPA, 16 U.S.C. § 824d(c), to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power").

Inclusion of a specific numerical rate or a clearly defined formula in a market-based rate tariff would not address nor further the Commission's oversight role as to those tariffs. Neither of those elements would indicate whether the seller was able to exercise market power, and thus could not answer whether continued use of market-based rates was reasonable. As these filing procedures satisfy the filed rate doctrine for market-based rates, we reject the Attorney General's implication that the filing of a specified numerical rate or a clearly-stated rate formula are the only means to satisfy the statutory requirement for market-based rate tariffs.

We also reject the claim that "all rates must be filed with FERC and published for public review *prior to the time service commences.*" Complaint at 5 (emphasis added). As stated in the July 25 Order, FPA § 205(c) does not "require that the Commission receive prior notice of market-based rates." 96 FERC at p. 61,506 (quoting language of subsection: "every public utility shall file with the Commission, within such time and in such form as the Commission may designate").

This is not to say the Commission fails to consider the reasonableness of the use of market-based rates prior to their effectiveness. Prior review consists, however, not of the particular prices agreed to by willing buyers and sellers. Rather, it consists of analysis to assure that the seller lacks or has mitigated market power so that its prices will fall within a zone of reasonableness. In the case of market-based rates, the just and reasonable standard of FPA § 205(e) is satisfied by the Commission's determination, prior to the effectiveness of those rates, that the utility (and its affiliates) lacks market power or has taken sufficient steps to mitigate market power. *E.g., Grand Council of the Crees*, 198 F.3d at 953 ("In reviewing such applications, the Commission demands that the power marketer establish that it, and its affiliates, either do not have, or have adequately mitigated, market power in both generation and transmission. The applicant must also establish that it cannot erect barriers to entry, and that there is no evidence of other behavior perceived as anti-competitive, such as affiliate abuse or reciprocal dealing.").

Lack of market power justifies use of market-based ratemaking because it indicates that "customers have genuine alternatives to buying the seller's product." *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 at

p. 61,144 (1993). The availability of genuine alternatives provides a sufficient basis for the Commission to conclude that "market discipline" will be sufficient to keep the prices that sellers charge within the statutorily-prescribed just and reasonable zone. *Elizabethtown*, 10 F.3d at 871. The prior market power review thus meets the FPA § 205(e) standard.

The current reporting requirements provide an efficient and adequate means for the Commission and the public to examine on a continuing basis whether a seller and its affiliates lack market power. After-the-fact quarterly reports provide a means for spotting pricing trends, discriminatory patterns, or other indicia of the exercise of market power.

Contrary to the Attorney General's contention, reliance on *MCI* and *Maislin* is misplaced in this case because of the difference in the underlying statutory schemes. Both the Interstate Commerce Act in *Maislin* and the Communications Act in *MCI* are based on a common carrier regulatory model that requires "that rates to all shippers be uniform and comply with the single tariff filed with the Commission," while, in contrast, the FPA "recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as part of the rate schedules." *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 345 (1956). Further, filings under section 205(c) are to be made "within such time and in such form as the Commission may designate. . . ." Thus, parties are free to contract even before actual prices under a market-based tariff are filed with the Commission. In short, the absolute prior filing requirement found in the statutes addressed by *Maislin* and *MCI* are not found in the FPA.[38]

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[38] Nevertheless, in Order No. 2001, the Commission required that marketers report transaction-specific information in their after-the-fact quarterly transaction reports, citing to the need for full disclosure, as expressed in *Maislin* and *MCI*, to assure that rates fall within the zone of reasonableness. *See Revised Public Utility Filing Require-*

Further, the Attorney General's reliance on *MCI* and *Maislin* rest on a view that the after-the-fact quarterly reports constitute the only rate filings for market-based rates. That is erroneous; unless and until a utility can demonstrate that it (and its affiliates) lacks market power in the relevant market, it will not be granted market-based rate authority. A prior finding of lack of market power justifies Commission approval of market-based rates as just and reasonable, and thus the on-file market-based umbrella tariff (which was the subject of Commission approval) preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so. The later-filed quarterly reports allow monitoring by the public and Commission to determine whether the lack of market power finding remains valid. The umbrella tariff, in conjunction with the quarterly report filings, thus allow us to fulfill our statutory obligations to assure that market-based rates are properly in effect as just and reasonable. *See, e.g., Southern Company Energy Marketing, L.P.*, 86 FERC ¶ 61,131 at p. 61,460 n.41; *Koch Gateway Pipeline Co.*, 66 FERC ¶ 61,385 at p. 62,306 (1994).

The Complaint charges that quarterly filing "effectively shifts the burden of proof as to the reasonableness of rate to purchasers . . . [and] violates the cardinal purpose of the filing requirement, which is to *prevent* public utilities from charging excessive rates by providing an opportunity for FERC to act before rates go into effect." Complaint at 3 (emphasis in original); *see also id.* at 13 ("after-the-fact reporting of rates virtually eliminates any meaningful review of rates under Section 205"). These charges ignore that before a utility can charge market-based rates, the Commission must find the utility (and its affiliates) lacks or has mitigated market power. That determination supports a conclusion that resulting market-based rates, through market discipline, will be just and reasonable.

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ments, 99 FERC ¶ 61,107, mimeo at pp. 51-52 and fn 101 and 89-91 and fn 160 (April 25, 2002).

E.g., *PacifiCorp Power Marketing Inc.*, 98 FERC ¶ 61,108 at p. 61,326 (2002). The filings give notice of the actual prices that were charged and allow monitoring to assure that conditions have not changed so as to permit the exercise of market power, and therefore that market rates will no longer be in the zone of reasonableness. *E.g.*, *Enron Power Marketing Inc.*, 65 FERC ¶ 61,305 at p. 62,406 (1993) (noting the necessity for "informational filings" as offering the means "to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power").

The current filing and reporting plan for market-based rates is consistent with the underlying statutory plan. Under FPA § 205, utilities propose rates for Commission approval as being just and reasonable. FPA § 206 complaint procedures apply when it appears that those rates are no longer just and reasonable.[39] When the Commission moves to a market-based rate system, it "must retain some general oversight over the system, to see if competition in fact drives rates into the zone of reasonableness 'or to check rates if it does not.'" *Interstate Natural Gas Ass'n of America v. FERC*, No. 98-1332 *et al.*, (April 5, 2002), slip op. at 10; *see id.* at 15 ("set[ting] great store" on the availability of "monitoring and assurance of remedies in the event of insufficient competition" as adequate safeguards). The reporting and filing requirements for market-based rates allow us to do just that.

Case law indicates that monitoring and FPA § 206 complaint procedures offer sufficient protection against consumer exploitation in a market-based rate context. *See*

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[39] In this regard, FPA § 206 complaint procedures apply in the same manner to market-based rates as they do to cost-of-service or formula rates. In all cases, rates become effective after an initial determination that proposed rates are just and reasonable. If those same rates later appear to be excessive, they can be changed only (assuming the utility does not file new rates) through FPA § 206 procedures, which place the burden on the moving party, not the utility. Thus, the Complaint really challenges the statutory scheme, not market-based rates.

Elizabethtown, 10 F.3d at 870 (approving market-based rates, in part, because Commission "will exercise its [NGA] § 5 authority . . . to assure that a market (*i.e.*, negotiated) rate is just and reasonable"); *see Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 689 (D.C. Cir. 2000), *aff'd sub nom., New York v. FERC*, 122 S.Ct. 1012 (2002) (if a party "has evidence that the tariff results in undue discrimination in its individual circumstances, [that party] remains free to file a petition under FPA § 206 for redress"). In sum, the current plan follows from and furthers the statutory objectives.

Adequate notice of rates thus does not necessarily require the filing of a specific numerical rate. Rather, it requires that the notice "enable[s] purchasers to 'know in advance the consequences of the purchasing decisions they make.'" *Western Resources, Inc. v. FERC*, 72 F.3d 147, 149 (D.C. Cir. 1995) (citations omitted). When tariffs with market-based rates are approved by the Commission, purchasers know in advance that, to borrow the Complaint's language (at 9), the rates could "fluctuate widely and rapidly (every hour or less in the ISO and PX) according to supply and demand and any other consideration taken into account by buyers and sellers in the course of business." Based on such possible fluctuations, purchasers can predict in advance the consequences of relying, for example, on last minute spot purchases in a sellers' market. *See In re California Power Exchange Corp.*, 245 F.3d 1110, 1116 (9th Cir. 2001) (contrasting consequences of reliance on spot purchases with those based on managing risks through long-term contracts); July 25 Order at p. 61,506 n.31 (noting when market-based rates are used, buyers "can predict that rates will fluctuate").[40]

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[40] In a buyers' market, as existed in California in the first years after restructuring, the consequences of heavy reliance on spot markets were favorable to purchasers. Presumably, this is why the Attorney General did not challenge market-based tariffs and our notice and filing requirements during that period, even though, for all practical

The Commission disagrees with the Complaint's contention (at 15) that the current filing and reporting requirements "exceed[] the bounds set by [the] controlling statute in an effort to promote competition in the electricity industry." As demonstrated above, the filing and reporting requirements have been tailored in a way that fully satisfy our duty to assure that rates are just and reasonable, while at the same time promoting the non-cost benefits that flow from market-based pricing, such as the building of new generation.

Given the very large number of transactions along with, in many cases, their short duration, after-the-fact reporting allows the market to operate initially without regulatory intrusion, while, at the same time, offering a safeguard that places sellers on notice that their transactions will be subject to review and to prospective remedial action, including the possible loss of their market-pricing authorization. *Louisville Gas & Electric Co.*, 62 FERC at p. 61,143 n.15 (1993) (noting that "periodic, update market analyses and complaints" are appropriate mechanisms for assuring "that a seller's right to sell at market-based rates is revoked if the seller, subsequent to the Commission's acceptance of market-bassed [*sic*] rates, acquires market power in a relevant market"). This filing and reporting plan represents the type of "pragmatic adjustments which may be called for by particular circumstances," that courts have long interpreted the FPA to allow. *E.g., FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 642 (1972).

The Complaint "does not contend that market-based pricing *per se* violates the FPA." Complaint at 13. The Attorney General suggests that market-based pricing could be used "so long as rates do not exceed a cap lawfully established by FERC." *Id.* As the Complaint acknowledges, such a "system [is] currently in place

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purposes, the tariffs and requirements operated then as they did in 2000-01.

throughout the Western Systems Coordinating Coun[cil]." *Id.* at 14 n.13.[41] Rate caps offer a useful remedy in certain circumstances, but they are not, as the Complaint seems to suggest, necessary or appropriate in all circumstances. At one time, the Commission required an avoided cost showing as a regulatory backstop for assuring the reasonableness of market-based rates. *E.g.*, *Louis Dreyfus Electric Power Inc.*, 61 FERC ¶ 61,303 at p. 62,142 (1992). With experience, the Commission determined that "reliance on an 'avoided cost' requirement would be validating rather than detecting the exercise of market power," and, as a result, dropped use of that cap. *Louisville Gas & Electric*, 62 FERC at p. 61,143 n.15.

As our action in the WSCC indicates, a ceiling rate can be a useful ratemaking measure in certain circumstances. Other circumstances, however, could call for the use of different measures. For example, the Commission currently requires a different form of price mitigation in the ISO's spot market, until September 30, 2002. We reject the Attorney General's argument that we are required to employ a cap as the primary means of assuring that market-based pricing meets the just and reasonable standard. The better approach, in our view, is to have in place adequate infrastructure, market rules that are not subject to gaming, and other foundations of a well-functioning market.

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[41] As the Complaint addresses only matters related to the California market, which are subsumed within the WSCC, it is difficult to surmise how the Attorney General is injured given this recognition of the refund system currently in place. While the Complaint indicates differences over "the appropriate level of the cap," *id.*, those differences are being litigated in the pending refund hearings. Similarly, to the extent the Complaint challenges the validity of the October 2, 2000 refund effective date, it constitutes an impermissible collateral attack on the Commission's prior orders. Moreover, that matter is currently the subject of court appeals.

D. *Deficiencies in Quarterly Reports Filed by Marketers*

As discussed below, the Commission agrees with the Attorney General's position to the extent that he argues that some sellers have failed to comply with the Commission's existing reporting requirements. Pursuant to section 205(c) of the FPA and the Commission's reporting requirements as contained in orders authorizing sellers' market-based rates and as interpreted in Commission precedent, sellers must report transaction-specific information in their quarterly transaction reports. As a corollary, the reporting of aggregated data does not comply with existing Commission requirements.

The Commission has previously concluded that the reporting of transaction-specific information is a necessary component of our section 205(c) requirements. That is not to say that the after-the-fact reports establish the market rate but, rather, they are an important tool in assuring that a seller's use of market-based rates remains reasonable. In *EPMI I*, the Commission explained that it was denying Enron's request to aggregate data in its quarterly reports because "informational filings are necessary so that the marketer's rates will be on file as required by Section 205(c) of the FPA, 16 U.S.C. § 824d(c), to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power."[42] Most recently, in Order No. 2001, the Commission explained that aggregated data do not provide sufficient disclosure of rates to the public and would prevent customers from detecting improper conduct.[43]

Further, contrary to the assertions of some respondents, the Commission has consistently required that marketers report transaction-specific information in their quarterly reports. In *Citizens*, the Commission established the reporting requirement and identified specific categories of information to be disclosed in the quarterly reports:

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[42] *EPMI I*, 65 FERC ¶ 61,305 at p. 62,406. *See also, Heartland Energy Service, Inc.*, 68 FERC ¶ 61,223 at p. 62,065 (1994) (*Heartland*); *InterCoast Power Marketing*, 68 FERC ¶ 61,248 at p. 62,134 (1994).

[43] *Revised Public Utility Filing Requirements*, 99 FERC ¶ 61,107, mimeo at 51-52 and fn 101 (April 25, 2002), citing *Maislin* and *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995).

> For each purchase contract and sale contract, Citizens Power should provide the following information: the buyers or sellers name; a brief description of the service, including degree of firmness; the delivery point for each service; the price of each service; the quantities to be served or purchased; the contract's duration; . . . and any other attributes of the product being purchased or sold which contribute to its market value.[44]

As noted above, in *EPMI I*, the Commission denied Enron's request to report sales and purchase data on an aggregate basis. Some respondents argue that *EPMI I* is inapposite because the Commission denied Enron's request to aggregate data in one way, while the respondents aggregate data differently. We find this argument unpersuasive. The Commission clearly stated "[w]e will deny Enron's request to modify the reporting requirement in any way."[45] If marketers believed that the order did not preclude other methods of aggregating information, it was incumbent upon them to request such guidance from the Commission.

In *Heartland*, 68 FERC ¶ 61,223 at p. 62,065, the Commission held Heartland, an affiliate of Wisconsin Power and Light Company, to the reporting standards in *EPMI I*. Heartland's filing was the first application by an affiliated power marketer for open-ended authorization to transact at market-based rates.[46] In subsequent orders, the Commission has consistently made clear that marketers must report transaction-specific data.[47] Thus, we reject the respondents' arguments that marketers were either not subject to the case-specific holding of *EPMI I*, or that nuances in the Commission orders accepting their market-based rate tariffs and requiring the submission of quarterly transaction reports somehow held certain marketers to a lesser reporting standard.[48]

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[44] 48 FERC ¶ 61,210 at p. 61,778. From the context, it is clear that the "contract" refers to individual purchase and sales transactions, and not to "umbrella" contracts. This distinction is also made clear from the Commission's subsequent discussion of the reporting requirement in *Southern Company Services, Inc.*, 75 FERC ¶ 61,130 at p. 61,444 (1996), *on reh'g*, 87 FERC ¶ 61,214 (1999); *reh'g dismissed*, 99 FERC ¶ 61,103 (2002).

[45] *EPMI I*, 65 FERC ¶ 61305 at p. 62,406.

The quarterly reports submitted recently by a number of the respondents do not comply with these requirements. For example, Williams Energy Marketing and Trading Company, Dynegy Power Marketing, Inc., Mirant Americas Energy Marketing, LP, and Reliant Energy Services, Inc. filed aggregated data in their transaction reports for the fourth quarter 2000 and all four quarters of 2001. These filings did not comply with the Commission's reporting requirements. Similarly, any other filings that report aggregate data did not comply with the reporting requirements.

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[46] *See also, Detroit Edison Company, et al.*, 80 FERC ¶ 61,348 (1997); *LG&E Power Marketing, Inc.*, 68 FERC ¶ 61,247 (1994) (denying affiliated marketer request to depart from the reporting requirements applicable to other marketers).

[47] *See, e.g., San Manuel Power Company LLC*, 96 FERC ¶ 61,089 at p. 61,370 fn 9 (2001) (listing reporting requirements, and explaining that marketers must provide price per transaction, no price ranges); *Huntington Beach Development, L.L.C.*, 96 FERC ¶ 61,212 at p. 61,895 (2001); and *Duke Energy Mohave, LLC*, 95 FERC ¶ 61,256 at p. 61,890 and fn 9 (2001); *Commonwealth Electric Company*, 78 FERC ¶ 61,191 (1997).

[48] Some respondents imply that, because they were directed to file "quarterly transaction summaries of specific sales," they were authorized to report transactions on a summary, *i.e.*, aggregated, basis. They are mistaken. Rather, the Commission's reporting requirement remained constant, and the quoted language simply directed marketers to comply with the requirement. In *Huntington Beach Development, LLC*, 96 FERC ¶ 61,212 at pp. 61,895-96, the Commission required Huntington Beach to report "quarterly transaction summaries of specific sales." Elsewhere in the same order, the Commission specified the information to be submitted for *each transaction*, and specifically stated that "transaction reports should not aggregate transactions by seller or purchaser." *Id.* at n.11. *See also, Southern Company Services, Inc.*, 75 FERC ¶ 61,130 at p. 61,444 (Southern to report "transaction summaries of *each individual short-term transaction* entered into under the filed umbrella service agreements").

As a remedy to cure this non-compliance, the Commission directs all marketers and other public utility sellers that made short-term sales at market-based rates to CERS or into the PX or ISO markets since October 2, 2000 to file in compliance with our reporting requirements, within 30 days, new quarterly transaction reports showing non-aggregated data for sales made during the period October 2, 2000 to the date of this order. Specifically, these new quarterly transaction reports must contain the following description of each transaction: identification of the buyer/seller; description of the service (*e.g.*, purchase/sale, firm/non-firm); delivery points(s); price(s) (power marketer must provide price per transaction, not price ranges); quantities (*e.g.*, MWh/MW); and dates/duration of service (*e.g.*, daily, monthly, hourly).[49] Further, all future quarterly reports must contain the same transaction-specific information, and conform to the new filing requirements required by Order No. 2001, once effective.

Those respondents that have filed transaction information in Docket No. PA02-2-000[50] will not be relieved of their obligation to file new quarterly reports pursuant to the above criteria. The information requested in the investigation differs from that described above for compliance with the quarterly reporting requirement. For example, the investigation template for short-term sales requires the reporting of weighted average prices.

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[49] *See e.g., Huntington Beach Development, LLC*, 96 FERC ¶ 61,212 at p. 61,895.

[50] *See Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

Further, the sellers in the ISO and PX markets must submit complete price data, including information for each clearing-price interval in the market. As we indicated in Order No. 2001, this information is necessary pursuant to section 205(c) of the FPA.[51] To the extent that this information has been filed in a docket before the Commission and is publicly available, *i.e.*, not subject to confidentiality protections, or is publicly available through another forum, such as the ISO website, sellers are not required to re-submit this information. However, we require sellers to identify with specificity the docket or forum where the information is publicly available. We will not require sellers to report information regarding transactions pursuant to the WSPP Agreement, *provided* that the WSPP has reported those transactions consistent with the reporting requirements for WSPP transactions.[52]

The Commission denies the Attorney General's request to institute a refund proceeding as a remedy as to those sellers who previously filed aggregated data. Under section 206 of the FPA, the Commission currently can institute a refund proceeding only for the refund effective period, which can begin no sooner than 60 days after the filing of a complaint. Thus, we are currently precluded under section 206 from extending refund responsibility to transactions prior to 60 days from the date of the Attorney General's March 16, 2002 complaint. Further, to the extent the Attorney General is arguing that we could order refunds prior to the October 2, 2000 refund effective date in the Docket [illegible] 00-95 complaint proceeding, this too is prohibited by the statute except in limited circumstances that are not present here.

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[51] Order No. 2001, mimeo at pp. 89-91.

[52] For many years, the WSPP was obligated to report, on a quarterly basis, transaction-specific information for each transaction made pursuant to the WSPP Agreement. *See Western Systems Power Pool*, 59 FERC ¶ 61,249 (1992) (specifying reporting requirements); *Western Systems Power Pool*, 55 FERC ¶ 61,495 (1991) (directing WSPP to submit transaction reports quarterly). However, the WSPP's reporting requirement was eliminated in an April 25, 2002 order, *Western Systems Power Pool*, 99 FERC ¶ 61,104 (2002). Marketers are now required to report WSPP transactions directly to the Commission by their inclusion in marketers' quarterly transaction reports.

The Attorney General argues that, while section 206 bars retroactive refund liability in cases challenging existing rates, the provision does not bar the relief requested in the complaint because, due to the deficiencies in the sellers' quarterly transaction reports, no rates were lawfully on file in the first instance. This position ignores the fact that the sellers at issue, all authorized to make power sales at market-based rates, have a tariff on file that provides for power sales at market-based rates. Those tariffs, not the quarterly reports, constitute the authorization to sell at market-based rates. Power sales made pursuant to a previously accepted market-based rate tariff are, in effect, pre-authorized pursuant to the acceptance for filing of the market-based rate tariff.[53] The quarterly reports allow for monitoring and oversight of that tariff. The reporting deficiencies identified by the Attorney General in the quarterly reports, while serious and in need of correction, do not invalidate market-based pricing tariffs as lawful filed rates. Thus, contrary to the Attorney General's position, section 206 bars retroactive refunds in this proceeding, or in the EL00-95 proceeding.

In our view, the failure to report transactions in the format required by the Commission for quarterly reports is essentially a compliance issue. By itself, non-compliance with reporting requirements by some sellers does not render unlawful all market-based rate sales in the California markets since January 1, 2000. In essence, the complaint seeks to use non-compliance of some sellers to void for all sellers the section 206 refund effective date of October 2, 2000 in Docket No. EL00-95. That proposal, in our view, exceeds what the FPA requires as well as what is equitable.[54] We have previously rejected attempts to extend the refund period earlier than the statutorily-based October 2, 2000 refund date, and we will do so here as well.[55] Rather, the sellers' re-filing of quarterly reports to include transaction-specific data is an appropriate and sufficient remedy in this proceeding.

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[53] *See GWF*, 98 FERC ¶ 61,330 at pp. 62,390-91; *PacifiCorp Power Marketing, Inc.*, 97 FERC ¶ 61,105 (2001), *reh'g denied*, 98 FERC ¶ 61,108 (2002).

The Commission orders:

(A) The Complaint is hereby dismissed in part, as discussed in the body of this order.

(B) The complaint is hereby granted in part and denied in part, as discussed in the body of this order.

(C) All marketers and other public utility sellers that made short-term sales of electric energy and electric capacity at market-based rates in the ISO markets, PX markets and to CERS during the period during the period October 2, 2000 to the date of this order must, within thirty (30) days from the date of this order, file new quarterly transaction reports showing non-aggregated data for sales made during the period October 2, 2000 to the date of this order.

(D) All marketers and other public utility sellers that made short-term sales of electric energy and electric capacity at market-based rates in the ISO markets, PX markets and to CERS must, prospective from the date of this order, report all sales at market-based rates in quarterly transaction reports on a transaction-specific basis, as discussed in the body of this order, until such time that the revised filing requirements in Order No. 2001 are implemented.

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[54] When the Commission is considering what remedy may be appropriate, as it is doing here, its discretion is at its "zenith." *Connecticut Valley Electric Co., Inc. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000); *Towns of Concord et al. v. FERC*, 955 F.2d 67, 72-73, 76 & n.8 (D.C. Cir. 1992); *Niagara Mohawk Power Co. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

[55] *E.g., San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 61,120 at p. 61,505.

(E) CARE's motion to consolidate is hereby denied.

Commissioner Massey concurred with a separate statement attached.

Appendix

Docket No. EL02-71-000

AES Companies (AES)*

Allegheny Energy Supply Company, LLC (Allegheny)*

Aquila Merchant Services, Inc. (Aquila)* **

Automated Power Exchange, Inc. (APX)*

Avista Energy, Inc. (Avista)*

BP Energy Company (BP)*

California Electricity Oversight Board

California Independent System Operator Corporation

Calpine Energy Services, L.P. (Calpine)*

Cities of Santa Clara and Palo Alto, California

City of Seattle, Seattle City Light (Seattle)*

City of Tacoma, Washington (Tacoma)* **

Cogeneration Association of California and Energy Producers and Users Coalition (CAC/EPUC)*

Competitive Supplier Group (consists of: Pinnacle West Capital Corporation; Arizona Public Service Company; PacifiCorp; PacifiCorp Power Marketing, Inc.; El Paso Merchant Energy, LP; IDACORP Energy L..P.; Portland General Electric Company; Enron Power Marketing Inc.; Puget Sound Energy, Inc.; Public Service Company of Colorado; Avista Energy, Inc.; Coral Power, L.L.C.; Powerex Corp.; Sempra Energy Trading; Sempra Solutions; Sempra Energy Resources; PPL EnergyPlus, LLC; PPL Montana, LLC; and GWF Energy LLC.

Constellation Power Source, Inc. (Constellation)*

Coral Power, LLC (Coral)* (filed answer and separate motion to dismiss)

Duke Energy Morro Bay, LLC, Duke Energy Moss Landing, LLC, Duke Energy Oakland, LLC, Duke Energy South Bay, LLC, and Duke Energy Trading and Marketing, L.L.C. (collectively "Duke Energy")*

Dynegy Power Marketing, Inc.; El Segundo Power, LLC; Long Beach Generation LLC; Cabrillo Power I LLC; Cabrillo Power II LLC; and Dynegy Power Services, Inc. (Dynegy)*

Edison Mission Marketing & Trading, Inc. (EMMT) *

El Paso Merchant Energy, L.P. (EPME)*

Electric Power Supply Association and Western Power Trading Forum (EPSA/WPTF)*

Electricity Consumers Resource Council (ELCON)*

Enron Power Marketing, Inc. (Enron)*

Exelon Corporation, on behalf of Exelon Generation Company, LLC, Commonwealth Edison Company and PECO Energy Company (Exelon)*

Fresno Cogeneration Partners, LP, Wellhead Power Gates, LLC, and Wellhead Power Panoche, LLC (Wellhead companies)* **

GWF Energy LLC (GWF)*

IDACORP Energy L.P. (IDACORP)*

Idaho Power Company (Idaho Power)*

Independent Energy Producers Association (IEP)*

Merrill Lynch Capital Services, Inc. (MLCS)*

Mirant Americas Energy Marketing, LP, Mirant California LLC, Mirant Delta, LLC, and Mirant Potrero, LLC (collectively, "Mirant")*

Modesto Irrigation District

Morgan Stanley Capital Group Inc. (Morgan Stanley)*

NEO California Power LLC

Nevada Attorney General's Bureau of Consumer Protection

Nevada Power Company and Sierra Pacific Power Company (Sierra)*

Pacific Gas and Electric Company

PacifiCorp*

PacifiCorp Power Marketing, Inc. (PPM)*

PG&E Energy Trading-Power, L.P. (PGET)*

Pinnacle West Capital Corporation, Arizona Public Service Company, and APS Energy Services Company (Pinnacle)*

Portland General Electric Company (Portland)*

Powerex Corp. (Powerex)*

PPL EnergyPlus, LLC and PPL Montana, LLC (PPL)*

PSEG Energy Resources & Trading LLC (PSEG)

Public Service Company of Colorado (PS Colorado)*

Public Service Company of New Mexico (PNM)*

Public Utilities Commission of the State of California (CPUC)**

Puget Sound Energy, Inc. and Avista Corporation (Puget)*

Reliant Energy Services, Inc. (Reliant)*

Sacramento Municipal Utility District

Sempra Energy Trading Corp., Sempra Energy Solutions and Sempra Energy Resources (Sempra)*

Southern California Edison Company

Southern California Water Company

Strategic Energy L.L.C. (Strategic Energy)*

Sunrise Power Company, LLC (Sunrise)*

TransAlta Energy Marketing (US), Inc. and TransAlta Energy Marketing Corporation (TransAlta)*

TransCanada Energy, Ltd. (TransCanada)*

Turlock Irrigation District

Universal Studios, Inc.

Williams Marketing & Trading Company (Williams)*

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* entities filed substantive pleading (answer, protest, comments or motion to dismiss)

** Motion to intervene out-of-time

William L. Massey, Commissioner, *concurring:*

Today's order denies, in most respects, California's complaint that our regulatory regime governing market based rates violates the Federal Power Act requirement that rates must be on file. That regime has three major components: a finding that a seller does not have market power, a general tariff that allows the seller to charge market based rates, and quarterly transaction reports filed by the seller. The order finds that this program satisfies the requirements of the Federal Power Act, as interpreted in various court decisions.

I agree with the findings made in today's order, but am concurring to say that other aspects of our market based policies still need attention. To the extent that this is Mr. Lockyer's point in filing this complaint, I agree with him.

First, we must ensure that the markets in which we allow market based pricing are truly competitive – and that the sellers that we allow to charge market based rates do not have market power and cannot otherwise manipulate the market. This is the bedrock factor in our market based pricing regime. I understand that competitive markets require market based pricing. But if those markets are to bring benefits to customers, sellers must not be able to control prices. We have made progress in this area with the Supply Margin Assessment for evaluating market based pricing authority, but recent revelations show we have more to do.

Second, the establishment of well-structured RTOs in all regions of the country will facilitate regional trading platforms that are worthy of market-based pricing. We must redouble our efforts in establishing RTOs.

Third, we need market rules that remove the incentives for manipulation, and that prohibit abusive behavior and sham transactions. The staff must pursue and complete its ongoing investigation into what went on in the Western markets during 2000 and 2001 so that we learn exactly what behavior occurred and adopt measures to prevent any bad behavior in the future. Our Standard Market Design initiative has the promise of promoting good markets with a low probability of being abused, and I support Chairman Wood's commitment to pursue the SMD aggressively.

Fourth, we need good, aggressive market monitoring. This will require team work between our new market oversight office and the regional market monitors.

Fifth, we need effective up-front market mitigation measures – measures that will prevent withholding and artificial price run ups. As we have seen, electricity prices can soar quickly, and and we must prevent unwarranted price run ups. In another case on today's agenda, we approve revisions to the New York ISO's Automated Mitigation Procedures.[1] This is an excellent example of the kind of up front mitigation we need.

And sixth, where abuses occur, we must take corrective action. We must have refund protection in place for consumers in all markets so that they do not pay rates that are unjust and unreasonable. The Commission proposed such a refund condition last fall and we have received industry comment on it. We should make it effective and it should apply to all markets, including those administered by RTOs and ISOs. I also would prefer a refund condition that is triggered by both bad behavior and by a dysfunctional market. Rates are not just and reasonable in both situations.

While I agree with the basic conclusions reached in today's order, the aspects of our market based pricing program just discussed need attention to bring the benefits of competition to customers and ensure that they pay only just and reasonable rates. I agree with Attorney General Lockyer in this important respect. California was burned by a dysfunctional market, a poor market design, the exercise of market power and abusive behavior. Consumers should never suffer this kind of debacle again.

For these reasons, I concur with today's order.

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[1] *New York Independent System Operator, Inc., et al.*, Docket No. ER01-3155-002, *et al.*

FEDERAL ENERGY REGULATORY COMMISSION

Commission Opinions, Orders and Notices

[¶ 61,295]

Docket No. EL02-71-001

STATE OF CALIFORNIA, *EX REL.* BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Complainant

v.

BRITISH COLUMBIA POWER EXCHANGE CORPORATION,
CORAL POWER, LLC, DYNEGY POWER MARKETING, INC.,
ENRON POWER MARKETING, INC., MIRANT AMERICAS
ENERGY MARKETING, LP, RELIANT ENERGY SERVICES, INC.,
WILLIAMS ENERGY MARKETING & TRADING COMPANY;

ALL OTHER PUBLIC UTILITY SELLERS OF ENERGY AND
ANCILLARY SERVICES TO THE CALIFORNIA ENERGY
RESOURCES SCHEDULING DIVISION OF THE CALIFORNIA
DEPARTMENT OF WATER RESOURCES; AND

ALL OTHER PUBLIC UTILITY SELLERS OF ENERGY AND
ANCILLARY SERVICES INTO MARKETS OPERATED BY THE
CALIFORNIA POWER EXCHANGE AND CALIFORNIA
INDEPENDENT SYSTEM OPERATOR,
Respondents

ORDER DENYING REHEARING

(Issued September 23, 2002)

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, Linda Breathitt, and Nora Mead Brownell.

1. In this order, the Commission denies rehearing of a May 31, 2002 order (May 31 order)[1] addressing a Complaint filed by the State of California, *ex rel.* Bill Lockyer,

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[1] *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp., et al.*, 99 FERC ¶ 61,247 (2002).

Attorney General of the State of California (Attorney General). This order is in the public interest because it elucidates the statutory requirements of the FPA and provides regulatory certainty regarding the filing and reporting requirements on which market-based rates are conditioned.

Background

2. On March 20, 2002, the Attorney General filed a complaint alleging that generators and marketers selling power into markets operated by the California Independent System Operator (ISO) and California Power Exchange (PX), as well as those making spot market sales of energy to the California Energy Resources Scheduling Division of the California Department of Water Resources (CERS), failed to file their rates as required by section 205(c) of the Federal Power Act (FPA), 16 U.S.C. § 824d(c) (1994). The complaint alleged that the section 205(c) filing requirement is not met by the Commission requirements that power marketers file (a) after a finding that they lack market power, rate schedules that give them authority to make sales at rates established by agreement between buyer and seller (*i.e.*, market based rates) and (b) quarterly transaction reports. The Attorney General further alleged that the quarterly reports actually filed by power marketers do not contain transaction-specific information about their sales and purchases at market-based rates as required by section 205(c) and the Commission's filing requirements.

3. With respect to the allegation that the Commission's market-based rate filing requirements violate the FPA as a matter of law, the May 31 order both dismissed the complaint insofar as it constituted a collateral attack on prior Commission orders, and denied the complaint on substantive grounds. With respect to the allegation that marketers' quarterly transaction reports were not in compliance with the Commission's reporting requirements, the Commission directed public utility marketers that made short-term sales at market-based rates to CERS or

into the PX or ISO markets since October 2, 2000, and that had not complied with the Commission's reporting requirements, *i.e.*, had not filed quarterly reports containing transaction-specific information with respect to their sales and purchases at market-based rates, to file new quarterly transaction reports showing non-aggregated data for the period October 2, 2000 forward. The Commission denied the Attorney General's request to institute a refund proceeding as a remedy to those sellers who previously filed aggregated data.

4. The Attorney General filed a timely request for rehearing. Californians for Renewable Energy, Inc. (CARE) filed a motion to intervene out-of-time and a timely request for rehearing of the May 31 order.

Discussion

Procedural Matters

5. With regard to CARE's motion for late intervention, we note that when late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.[2] CARE argues that, as a member of the general public, it does not have adequate understanding of Commission procedures or resources to obtain legal assistance. We find that CARE has not met its burden of justifying late intervention. CARE has participated in various Commission proceedings for close to two years,[3] and has the obligation to familiarize itself with the Commission's rules and procedures. Accordingly, CARE's motion for late intervention is denied and the request for rehearing will not be considered.

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[2] *See, e.g., Midwest Independent Transmission System Operator*, 99 FERC ¶ 61,258 (2002).

[3] On October 6, 2000, CARE filed a Complaint in Docket No. EL01-2-000, and has also participated in Docket No. EL00-95-000 *et al.*

Rehearing Request

6. The Attorney General argues that the FPA prohibits the use of market-based rates for sales of electric energy. He claims that, because a market-based rate tariff does not specify an exact numerical rate for each potential sale, the Commission cannot satisfy its obligation to assure that the proposed market-based rates are just and reasonable. On a related point, he argues that the Commission's reliance on market power studies to determine that rates are just and reasonable is inadequate because, he alleges, existing guideposts have not been reliable in making market power determinations. In addition, the Attorney General contends that the use of market-based rates violates the filed rate doctrine because the exact numerical rate of each sale is not on file with the Commission before the sale occurs. He also argues that the Commission's position is contrary to the FPA and contradicts Commission precedent. He claims that *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (*Maislin*) and *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (*MCI*), are directly on point and the Commission's attempts to distinguish these cases are inadequate.

7. Further, the Attorney General seeks clarification that the May 31 order denied on the merits the allegations (set forth in sections III and IV of the complaint) that the Commission's market-based rate filing requirements violate the FPA as a matter of law. To the extent that the allegations were dismissed as an improper collateral attack without reaching the merits, the Attorney General contends that the Commission erred. He argues that the issues raised in the complaint were not raised previously by any party in a Commission proceeding, and the Attorney General did not have an opportunity to litigate the issues in the proceedings cited in the May 31 order.

8. The Attorney General also argues that the Commission abused its discretion by not ordering refunds as a

remedy to the finding that sellers in the California markets did not comply with the requirement to report transaction-specific data. He argues that the May 15 order erred by treating the violations as a "compliance matter." According to the Attorney General, the reporting of aggregate data constituted a serious violation of the FPA and Commission rules because it "short circuited" the Commission's ability to monitor the market for market power abuse and other misconduct by generators and marketers with market-based rate authority.

9. The Attorney General also criticizes the conclusion that ordering refunds would be "inequitable." Rather, he claims that the equities support a refund proceeding considering the unjust and unreasonable rates in California, and in light of the fact that prohibited schemes such as "hockey stick bidding"[4] and "round trip trades"[5] escaped detection by the failure to report transaction-specific data. He contends that, while the Commission has discretion in determining the equities of the case, it failed in its responsibility to provide a well-reasoned explanation for its decision. According to the Attorney General, the Commission was required, but failed, to exercise its discretion in a manner consistent with (i) its fundamental statutory purpose, *i.e.*, the protection of the public interest and (ii) Commission precedent holding that quarterly transaction reports are essential to protect the public from excessive rates in a market-based regime.

10. The Attorney General further argues that the Commission, having found that sellers violated the terms and conditions of their grants of market-based rate authority, is no longer barred from ordering retroactive

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[4] Hockey stick bidding occurs when the last megawatts bid from a generation unit are bid at an excessively high price relative to the bid(s) on the other capacity from the same unit.

[5] A round trip trade involves the sale of an electricity product to another company together with a simultaneous purchase of the same product at the same price and at the same location.

refunds.[6] He argues that, just as in *Washington Water Power Company*,[7] where the Commission found that refunds were appropriate because of the severity of the violations and permissible because the marketer violated the terms of its market-based rate authorization, so here the failure to comply with the quarterly reporting requirement is serious and violates the terms of marketers' market-based rate authorizations. The Attorney General contends that his position is also supported by *Delmarva Power & Light Company*, 24 FERC ¶ 61,199 at p. 61,461, *on reh'g*, 24 FERC ¶ 61,380, *reh'g denied*, 25 FERC ¶ 61,308 (1983) (*Delmarva*), in which a utility collected spent nuclear fuel disposal costs through its fuel adjustment clause without prior Commission approval. The Attorney General argues that, just as Delmarva's improper use of its fuel adjustment clause allowed it to overcharge consumers with impunity, the failure of sellers in the California markets to file their rates in quarterly reports made it impossible for the Commission to monitor the California market to detect unreasonable prices and improper practices such as "hockey stick bidding."

Commission Ruling

A. *Legality of the Market-Based Rate Program*

11. The Attorney General reiterates his prior claims that the use of market-based rates violates the filed rate doctrine and prevents the Commission from satisfying its obligation to assure that the proposed market-based rates are just and reasonable because a market-based rate tariff does not specify the exact numerical rate (or, presumably, formula rate) for each potential sale. As we found in the May 31 order, the Attorney General's claims that the FPA prohibits the use of market-based rates for sales of

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[6] *Citing San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 61,120 at p. 61,507 (2001); *San Diego Gas & Electric Co., et al.*, 93 FERC ¶ 61,121 (2000) (Appendix E).

[7] 83 FERC ¶ 61,097 (Show Cause Order); 83 FERC ¶ 61,282 (1998) (Order on Responses to Show Cause Order) (*Washington Water Power*).

electric energy are an impermissible collateral attack on prior Commission orders rejecting those contentions.[8] Thus these claims are dismissed. In addition, we again find that these claims have no merit. These arguments of the Attorney General were addressed in the May 31 order, 99 FERC at pp. 62,062-64.

12. The Commission authorizes the use of market-based rates only after it determines that the public utility proposing to use market-based rates does not have, or has sufficiently mitigated, market power. This is consistent with court precedent that "when there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result."[9] Our recent announcement that, in response to significant structural changes and corporate realignments in the electric industry, we will apply, on an interim basis, a new generation market power screen to market-based rate applications pending review of new methods to analyze market power,[10] does not indicate, as the Attorney General argues (rehearing request at 17), that the existing guideposts have not been reliable in making market power determinations. Rather, our recent action makes clear that market power screening analyses will be modified when necessary to address industry changes that otherwise might allow market power to be

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[8] *See, e.g., San Diego Gas & Electric Co.*, 96 FERC ¶ 61,120 (2001).

[9] *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (*citing Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment"); *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *see also Cajun Electric Power Co-op, Inc. v. FERC*, 28 F.3d 173, 176, 179, 180 (D.C. Cir. 1994).

[10] *AEP Power Marketing, Inc.*, 97 FERC ¶ 61,219 (2001).

exercised in new ways.[11] Such modifications recognize that meeting our statutory duty to assure only just and reasonable rates is a dynamic process.

13. Further, the Attorney General's contention that FPA § 205(c) requires an exact numerical sale price to be on file with the Commission before a market-price sale is executed is baseless. As the Attorney General concedes, FPA § 205(c) explicitly leaves the timing and form of rate filings to the Commission's discretion: schedules showing all rates and charges must be filed with the Commission "within such time and in such form as the Commission may designate." In exercising that discretion, we have determined that, if a utility establishes that it does not have, or has adequately mitigated, market power and, therefore, that it will be able to charge only just and reasonable market-based rates, the filing of an umbrella market-rate tariff before sales are executed in conjunction with later-filed quarterly reports detailing the numerical rates actually charged satisfies the requirements of FPA § 205(c).[12] The Attorney General has not supported his claim that FPA § 205(c) mandates a different process.

14. Our statement in the May 31 Order that inclusion of a specific numerical rate or a clearly defined formula in a market-based rate tariff would not indicate whether the seller could exercise market power[13] does not, as the Attorney General contends (rehearing at 16), miss the mark. Inclusion of a specific numerical rate or formula in a market-based rate tariff would not provide information against which that rate could be compared, and therefore,

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[11] *See Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (agencies must be permitted to adapt their rules and policies to the demands of changing circumstances).

[12] We also reject the Attorney General's contention (rehearing request at 19 n.17) that quarterly reports must be treated by the Commission as new FPA § 205 filings. Quarterly reports simply report the actual transactions that were previously authorized by the Commission, and thus do not constitute new § 205 rate filings.

[13] May 31 Order at pp. 62,062-63.

would not assist us in determining whether the seller could exercise market power. In contrast, quarterly filings addressing the actual rates of sales made provide information regarding all sales made in the relevant market, and allow both the Commission and the public to compare actual rates charged for reasonableness and indications of market power.

15. Moreover, contrary to the Attorney General's claims (rehearing request at 14), it is not our position that "sellers with market-based rate authority comply with [FPA § 205(c)] by filing economic analyses purporting to show that they lack market power." The market power analysis provides information that the Commission evaluates, along with other pertinent information filed in a market-based rate proceeding, to determine whether the utility lacks market power. Thus, utilities file market power analyses as part of the rate filing necessary to substantively support their requests for market-based rate authority, not to satisfy filed rate doctrine requirements. As explained above, the filing of a utility's umbrella tariff plus quarterly reports are necessary to comply with FPA § 205(c) requirements.

16. Nor do we suggest, as the Attorney General asserts (rehearing at 20) "that rate filings were intended by Congress as a means of preventing discrimination only, and are unnecessary to determine whether rates are just and reasonable." Before we approve an application for market-based rates, we review the applicant's supporting evidence plus any contrary evidence to assure that the applicant cannot exercise market power. From that, it follows that a utility approved for market-based pricing will charge competitive rates that are just and reasonable. Quarterly reports provide a means for examining whether the utility continues to lack market power and, thus, that its rates remain just and reasonable, as well as for determining whether the utility's rates are unduly discriminatory.

17. Our holdings in this proceeding are fully consistent with those in *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Service*, 96 FERC ¶ 61,120 at p. 61,506 (July 25, 2001) ("July 25 Order"). Contrary to the Attorney General's claim (rehearing request at 15 n.15), the Commission did not hold in the July 25 order that the "filing of quarterly reports was necessary to trigger the application of the filed rate doctrine." Rather, we held there, as we do here, that, where market-based rate authority has been granted, the later filing of quarterly reports detailing actual sales made, in conjunction with the earlier-filed umbrella tariff, satisfies all purposes of the filed rate doctrine.

18. The Attorney General claims (rehearing at 18) that market-based rates cannot stand under the FPA because spot market rates will expire before an FPA § 206 complaint can be filed at the Commission, purportedly rendering the § 206 refund provision useless. As the Attorney General must be aware, due to the refund proceedings currently taking place regarding past period market-based rate markets in California, the FPA § 206 refund provision is as vital a part of market-based ratemaking as it is under cost-based ratemaking. Short-term sales made under a cost-based ratemaking regime would face the same refund limitations as those made under market-based rates. Thus, any complaints the Attorney General has concerning refund availability under FPA § 206 for spot market sales challenge the statutory scheme, not the validity of market-based rates.

19. We again find that the filing requirements associated with our market-based rate program do not conflict with *Maislin* or *MCI*.[14] In *Maislin*, the Court rejected an

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[14] Our finding is no longer based on the proposition in the May 31 Order that the statutes involved in *Maislin* and *MCI* were based on a common carrier model that did not allow for private contracting. Nor do we continue to base our finding on the proposition that the statutes at issue in *Maislin* and *MCI* contain absolute pre-transaction filing requirements. Further consideration has caused us to question the

Interstate Commerce Commission ("ICC") policy which, despite the ICA's filed rate requirement, allowed a carrier to receive, in lieu of its filed tariff rate, a lower, privately negotiated contract rate. Noting that the policy allowed carriers to receive privately negotiated contract rates that were never disclosed to the ICC, were never reviewed for reasonableness, and were not subject to challenge as discriminatory, the Court held that the ICC's policy violated the filed rate doctrine. In contrast, FERC market-based rate authority is granted only after we find the public utility lacks market power and a market-based rate umbrella tariff is filed with and accepted by the Commission after public notice and opportunity for comment. Moreover, our system requires the quarterly filing of the actual rates charged for individual transactions, allowing both the Commission and the public to review rates for reasonableness and lack of undue discrimination.

20. In *MCI*, the Court rejected a Federal Communications Commission ("FCC") policy that, despite the Communications Act's filed rate requirement, relieved all nondominant carriers of any requirement to file any of their rates with the FCC. The Court found that this amounted to wholesale detariffing for nondominant carriers, which violated the filed rate doctrine.[15] Our market-based rate system, by contrast, requires all those the Commission has authorized to offer market-based rates to have on file an umbrella market-rate tariff and to file quarterly reports. No detariffing has occurred in these circumstances.

21. The Attorney General seeks clarification that the May 31 Order denied solely on the merits the allegations

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accuracy of those statements. We again conclude, however, that our market-based rate filing requirements do not conflict with *Maislin* and *MCI* for the reasons stated below as well as for those addressed in the May 31 Order and not explicitly abandoned here.

[15] The Court found however, that the FCC "certainly [could] modify the form, contents, and location of required filings, and [could] defer filing or perhaps even waive it altogether in limited circumstances." *MCI*, 512 U.S. at 234.

that the Commission's market-based rate filing requirements violate the FPA as a matter of law. The May 31 Order, 99 FERC ¶ 61,247 at pp. 62,061-62, was abundantly clear that the Attorney General's challenge regarding the legality of the current filing and reporting requirements for market-based rate tariffs under the FPA was dismissed as a collateral attack because the same arguments had been advanced and addressed in prior Commission orders. In addition, the May 31 Order considered the substance of the issues and, after a thorough analysis, denied the complaint on the merits as well. *Id.*, at p. 62,062 ("even if these arguments were not dismissed, they lack merit").

22. The Attorney General argues that the dismissal was in error because the issues raised in the complaint had not been raised in previous Commission proceedings. In the July 25 Order, 96 FERC ¶ 61,120 at pp. 61,505-06, cited in the May 31 Order, the Commission, addressing arguments that the filed rate doctrine did not preclude retroactive refunds (prior to the October 2, 2000 effective refund date set forth in Docket No. EL00-95 *et al.*), concluded that "the Commission's current procedures for quarterly filing of market-based transactions satisfy the section 205(c) filing requirements for market-based rates." Thus, contrary to the Attorney General's claims, the substantive arguments brought in the complaint were raised and addressed in the earlier Commission order. Further, the Attorney General's claim that he did not have an opportunity to litigate the issues in the earlier proceedings is not relevant. By seeking to relitigate an issue decided in an earlier Commission order, the Attorney General is essentially requesting a rehearing after expiration of the statutory thirty-day deadline set forth in Section 313(a) of the FPA, 16 U.S.C. § 825*l*(a) (1994). If the Commission were to consider such collateral attacks, there would never be finality on issues addressed in Commission orders. Nonetheless, we note that the Attorney General, as an intervenor in Docket No. EL00-95 *et al.*, in fact had an

opportunity to litigate the filed rate doctrine-related issues in the earlier proceeding.[16]

B. *Denial of Refund Remedy for Deficiencies in Quarterly Reports*

23. The breadth of the Commission's discretion is at its zenith when called upon to fashion remedies.[17] Courts will not second-guess the Commission's judgment on remedies as long as the remedies have a rational basis.[18] As an expert agency, the Commission is vested with wide discretion to balance competing equities against the back drop of the public interest.[19] In the May 31 Order, the Commission concluded that the failure to report non-aggregated data was essentially a compliance issue and determined that the appropriate remedy was to require non-compliant sellers to submit the required information in the proper format. The Commission remains unpersuaded that the refund remedy requested by the Attorney General, even if legally available, would be appropriate under the circumstances.

24. The May 31 Order denied the Attorney General's request to institute a refund proceeding as a remedy for the filing of aggregated data in quarterly transaction

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[16] *See* July 17, 2001, Motion for Confirmation of Intervenor Status or, in the Alternative, Motion for Leave to Intervene Out-of-Time By the People of the State of California Ex Rel. Bill Lockyer. In the filing, the Attorney General moved to intervene in Docket No. EL00-95-031, noting his previous participation in the docket without formal intervention and stating that "[the Attorney General's] formal designation as a party to simply cure a possible procedural deficiency is appropriate." The July 25 Order granted the request as a late intervention. *July 25 Order*, 96 FERC ¶ 61,120 at pp. 61,503-04.

[17] *Niagara Mohawk Power Co. v. FERC*, 379 F.2d 153, 159 (D.C. Cir. 1967). *See also, Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1549 (D.C. Cir. 1985); *Mesa Petroleum Company v. FERC*, 441 F.2d 182, 187 (D.C. Cir. 1971).

[18] *Office of Consumers Counsel v. FERC*, 783 F.2d 206, 233 (D.C. Cir. 1986).

[19] *E.g., Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984).

reports.[20] The order explained that, under section 206 of the FPA, the Commission can institute a refund proceeding only for the refund effective period, which can begin no sooner than 60 days after the filing of a complaint. The order rejected the Attorney General's claim that section 206 does not bar the requested relief because, due to the deficiencies in the sellers' quarterly reports, no rates were lawfully on file. Instead, the Commission explained that the reporting deficiencies, while serious and in need of correction, did not invalidate market-based pricing tariffs as lawful filed rates. Further, the May 31 Order stated that:

> the failure to report transactions in the format required by the Commission for quarterly reports is essentially a compliance issue. By itself, noncompliance with reporting requirements by some sellers does not render unlawful all market-based rate sales in the California markets since January 1, 2000. In essence, the complaint seeks to use noncompliance of some sellers to void for all sellers the Section 206 refund effective date of October 2, 2000 in Docket No. EL00-95. That proposal, in our view, exceeds what the FPA requires as well as what is equitable.[21]

25. The Attorney General argues that the Commission failed to properly balance the equities in the proceeding. He claims that sellers' non-compliance with the reporting requirements prevented the Commission from effectively monitoring the market and, thus, gave sellers the opportunity to collect unjust and unreasonable rates in California and conceal illegal practices. In these circumstances, he contends, the Commission's discretion in fashioning a remedy is "bounded by a statutory framework that

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[20] *May 31, Order*, 99 FERC ¶ 61,247 at p. 62,067.

[21] *Id.*, at p. 62,068.

requires the Commission to take measures necessary to ensure just and reasonable rates."[22]

26. Fundamentally, the problem with the Attorney General's argument is that, while he has alleged and the Commission has found that some sellers were in non-compliance with one requirement, *i.e.*, the Commission's requirements for reporting market-based transactions, he seeks relief for different, unproven claims, namely that sellers charged unjust and unreasonable rates and engaged in "prohibited schemes." The Attorney General cannot bootstrap one complaint onto the other. Moreover, he has made no effort to establish the necessary record to demonstrate specific instances of alleged unjust and unreasonable rates or prohibited schemes – or that they resulted from sellers' non-compliance with the filing requirements.[23] The Attorney General's attempt to seek recovery for these high prices based on sellers' non-compliance with the reporting requirements is simply a non-sequitur.

27. Moreover, contrary to the Attorney General's claims, the Commission has and continues to engage in vigilant market oversight. The Commission as well as all market participants were aware that energy prices in California were rising beginning in early 2000.[24] The

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[22] Rehearing Request at 9.

[23] The Attorney General attaches as Appendix A to the rehearing request the General Accounting Office's (GAO's) June 2002 Energy Markets report to Congress. However, this report does not provide the necessary information that would permit us to find particular exercises of market power by individual sellers, nor does it require that we grant the Attorney General's preferred remedy of granting refunds.

[24] In July 2000, the Commission initiated a fact-finding investigation of the conditions in electric bulk power markets (including volatile price fluctuations in various regions of the country). *Investigation of Electric Bulk Power Markets*, 92 FERC ¶ 61,160 (2000). Later, Staff was asked to expedite the investigation as it related to California and markets in the Western Interconnection. *See also*, *San Diego Gas & Electric Co.*, 93 FERC ¶ 61,121 at p. 61,353 (2000) (describing

filing of aggregated data did not conceal the fact that prices were going up. However, the mere fact that sellers charged high prices did not necessarily show any violation of the terms of their market-based rate tariffs. As the July 25 Order explained, while the Commission may take retroactive action where a seller violates rules in applicable rate tariffs, intervenors had not demonstrated any such violations.[25] The Attorney General's demonstration of a reporting violation does not cure that defect, in that he has not related the violation to specific unlawful pricing. As a result, his efforts to obtain retroactive relief for alleged unjust and unreasonable rates must be denied for the same reason that similar requests were denied in the EL00-95 *et al.* proceeding.

28. The Commission has instituted formal enforcement investigations into specific instances of possible violations of the FPA and Commission orders and regulations by power marketers, including standards of conduct violations and trading strategies involving deceit.[26] If these allegations are found to be true, then the Commission could elect a full array of remedies, including the loss or suspension of market based rate authority and the disgorgement of profits that resulted from the violations of the FPA and Commission orders and regulations. In the instant proceeding, the Attorney General demonstrated non-compliance of some sellers with the quarterly reporting requirements, but has not shown how those reporting violations alone resulted in overcharges that should now be disgorged.

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conditions in the California wholesale electricity market during the Summer 2000).

[25] *July 25 Order*, 96 FERC ¶ 61,120, at pp. 61,507-08.

[26] *See El Paso Electric Company*, 100 FERC ¶ 61,188 (2002); *Portland General Electric Company*, 100 FERC ¶ 61,186 (2002); *Avista Corporation*, 100 FERC ¶ 61,187 (2002) (all issued August 13, 2002). Each order establishes a refund effective date.

29. Our conclusion is supported by Commission precedent. For example, in *Aquila Energy Marketing Corporation v. Niagara Mohawk Power Corporation*, we directed a public utility to comply with OASIS posting requirements that it had violated but declined to direct the disgorgement of profits as requested by the complainant.[27] The Commission distinguished *Washington Water Power*, in which we ordered disgorgement of profits. We explained that, while *Aquila* involved a reporting violation, in *Washington Water Power*, the public utility not only violated the OASIS posting requirements but, in doing so, conferred undue preferences to its marketing affiliate. Although the Attorney General likens the current case to *Washington Water Power*, his complaint only alleged and we have only found non-compliance with Commission reporting requirements. The violations here are more akin to those in *Aquila* and imposing a similar remedy is an appropriate exercise of our discretion.[28]

30. The Attorney General also contends that the Commission, by failing to order refunds or other sanctions, has not taken sufficient action to deter similar violations in the future.[29] We disagree. The Commission has made clear – and reiterates here – that non-compliance of filing requirements will not be tolerated. Order No. 2001, in which the Commission codified revised reporting requirements for quarterly reporting of market-based rate transactions, states that public utilities that fail to comply with the new reporting requirements may face revocation of their authority to make wholesale power sales at

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[27] 87 FERC ¶ 61,328, at p. 62,280 (1999) (*Aquila*).

[28] Likewise, Delmarva, also relied upon by the Attorney General, is readily distinguished as it involved the refund of unauthorized charges collected by a public utility and not compliance with Commission reporting requirements.

[29] Rehearing Request at 7.

market-based rates.[30] Our recently-initiated investigations into Enron and other sellers' marketing practices should make clear the Commission's intent to follow through with detailed investigation and appropriate sanctions when warranted.

31. This proceeding is limited, however, to reporting violations by some sellers. The Commission fashioned a reasonable remedy, designed to fix the deficiency, when it directed non-compliant sellers to file new transaction reports that contain non-aggregated data as required. As discussed above, the remedy is consistent with precedent regarding non-compliance with filing rules. *See Aquila* and *contrast Washington Water Power*. Further, the Commission's chosen remedy is appropriate because, despite the consistent position of the Commission (*see* May 31 Order at pp. 62,065-67) that transaction-specific data must be filed, their appears to have been some legitimate confusion as to the Commission's expectations. This is due at least in part to the fact that many sellers filed aggregated data in their quarterly reports for years without having been challenged by any market-participant.[31] For example, the Attorney General waited until March 2002 (when the complaint was filed) to challenge quarterly reports beginning with the first quarter of 2000, which would have been filed in April 2000.

32. In summary, the Commission properly exercised its discretion when it denied the request for retroactive refunds to remedy some sellers' non-compliance with the Commission's transaction reporting requirements. The Attorney General essentially attempts to bootstrap these limited reporting violations into an overarching showing that sellers employed unjust and unreasonable rates and

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[30] Order No. 2001, *Revised Public Utility Filing Requirements, FERC Statutes & Regulations* ¶ 31,127, at p. 30,145 para. 223 (April 25, 2002), *reh'g pending*.

[31] *See, e.g.*, April 9, 2002 Answer of El Paso Merchant Energy, L.P. to Complaint at 18-19; IDACORP Answer at 25; Sempra Answer at 19.

prohibited schemes. However, he fails to demonstrate these latter claims or their causal connection to the reporting violations. Consequently, the Commission fashioned an appropriate remedy when it required noncompliant sellers to submit transaction information in the required format. This remedy is consistent with Commission precedent and also takes into account that there appears to have been legitimate uncertainty whether aggregated data was acceptable. Accordingly, we deny the Attorney General's request for rehearing.

The Commission orders:

(A) The Attorney General's request for rehearing is hereby denied, as discussed in the body of this order.

(B) CARE's motion to intervene out-of-time is denied, as discussed in the body of this order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-73093

FERC No. FERC-EL02-71-000
Northern District of California, San Francisco

STATE OF CALIFORNIA, EX REL. BILL LOCKYER,
ATTORNEY GENERAL,
Petitioner,

CORAL POWER, LLC, ET AL.,
Intervenors,

MORGAN STANLEY CAPITAL GROUP, INC. ("MSCG"),
Respondent-Intervenor,

AES COMPANIES, ET AL.,
Intervenors,

POWEREX CORP., ET AL.,
Respondents-Intervenors,

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner-Intervenor,

WILLIAMS ENERGY MARKETING & TRADING COMPANY,
Intervenor,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

AVISTA CORPORATION,
Intervenor,

LONG BEACH GENERATION LLC,
Respondent-Intervenor.

[Filed July 31, 2006]

ORDER

Before: THOMAS, McKEOWN, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

STATUTORY PROVISIONS INVOLVED

The Federal Power Act, 16 U.S.C. §§ 791a *et seq.*, provides in relevant part:

16 U.S.C. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine –

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are –

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to –

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

16 U.S.C. § 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e)(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to –

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

The Natural Gas Act, 15 U.S.C. §§ 791a *et seq.*, provides in relevant part:

15 U.S.C. § 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f)(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that –

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

15 U.S.C. § 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

October 23, 2006

Mr. David C. Frederick
Kellogg Huber Hansen
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Powerex Corp., et al.
v. California, ex rel. Bill Lockyer, Attorney
General of California, et al.
Application No. 06A400

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on October 23, 2006 extended the time to and including December 28, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ JEFFREY ATKINS
Jeffrey Atkins
Supervisor-Case Analyst Division

[attached notification list omitted]

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No. 06-888

Supreme Court, U.S.
FILED
FEB 5 - 2007
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In The
Supreme Court of the United States

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CORAL POWER, L.L.C., ET AL.,

Petitioners,

v.

STATE OF CALIFORNIA EX REL.
EDMUND G. BROWN JR., ATTORNEY GENERAL, ET AL.,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF FOR RESPONDENT IN OPPOSITION

◆

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission has the power to order retroactive refunds where a public utility violates both Section 205 of the Federal Power Act, 16 U.S.C. § 824d, and a condition of its "market-based rate tariff" by failing to report transaction-specific data specifying the rates it charged individual buyers.

2. Whether a tariff which contains no ascertainable rates, just a statement that rates will be determined "by agreement," coupled with post-performance reporting of the rates charged, produces valid filed rates under the Federal Power Act and this Court's decisions in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), and *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

LIST OF PARTIES

The California Attorney General incorporates by reference the list of parties in the petition, except he notes that neither the California Public Utilities Commission nor Williams Energy Marketing & Trading Co. should be listed as a respondent because they were not granted intervenor status in the Ninth Circuit. Rule 14.1.(b). The California Attorney General further notes that TransAlta Energy Marketing (California) Inc. and TransAlta Energy Marketing (U.S.) Inc. intervened in the Ninth Circuit and should therefore be listed as respondents.

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BRIEF FOR RESPONDENT IN OPPOSITION

The State of California *ex rel.* Edmund G. Brown Jr., Attorney General, respectfully submits this brief in opposition to the petition for a writ of certiorari to the Ninth Circuit Court of Appeals filed by Coral Power, L.L.C., et al.

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INTRODUCTION

Petitioners distort the holding of the Ninth Circuit so as to create the appearance of a conflict with the Federal Power Act ("FPA") and decisions of this Court and the circuit courts regarding the "filed rate doctrine." There is no conflict.

Contrary to petitioners' claims, the Ninth Circuit did not hold that Section 205 of the FPA, 16 U.S.C. § 824d, gives FERC authority to order retroactive refunds on properly filed rates. It held that (1) petitioners and other sellers violated FPA Section 205 and a condition of their market-based rate tariffs by failing to report the rates they charged to FERC, and (2) as a result of those violations, they did not properly file their rates and cannot invoke the filed rate doctrine as a bar to refund claims. FERC's authority to order refunds on past sales in the face of Section 205 violations is well-established.

Even if petitioners were correct about the holding, the judgment would still be valid on alternate grounds. The filed rate doctrine does not apply in this case because petitioners did not properly file their rates under any theory. The FPA and numerous decisions of this Court and the circuit courts make it eminently clear that a market-based rate tariff, which contains no rates at all, is not entitled to traditional, "filed rate" protections from refund claims, whether or not utilities report their transaction data to FERC after-the-fact.[1] Thus, the court's remand to FERC was the correct result, regardless of the reasons given by the Ninth Circuit.

Finally, petitioners fail to show any exigency requiring intervention by this Court. Petitioners offer no evidence, just overheated speculation, about the decision's impact on the nation's power markets. Although the decision was issued more than two years ago, petitioners cite no evidence that it has caused, or will cause, any adverse commercial or regulatory consequences. The petition should be denied.

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STATEMENT

A. Regulatory Framework

This case involves the scheme of regulation established by Congress for ensuring "just and reasonable" rates for wholesale electricity. 16 U.S.C. § 824d(a). FPA Section 205(c) provides in part that utilities must file "*schedules showing all rates and charges for any transmission or sale* subject to the jurisdiction of the Commission . . . together with all contracts which in any manner affect or relate to such rates. . . ." 16 U.S.C. § 824d(c) (emphasis added).

Section 205(d), 16 U.S.C. § 824d(d), requires utilities to give notice of any proposed rate changes. Utilities must file "new schedules stating plainly the change or changes to be made," and no change "shall be made . . . except after sixty days' notice to the Commission and to the public." *Id.*

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[1] The California Attorney General is filing, concurrent with this opposition, a conditional cross-petition under Rule 12.5 addressing this issue.

Once notice has been given, FPA Section 205(e) authorizes FERC to "suspend" and thereby "defer the use" of a proposed rate for up to five months pending an investigation "concerning the lawfulness of such rate, charge, or classification. . . ." 16 U.S.C. § 824d(e). If no decision has been rendered by that point, the proposed rate "shall go into effect. . . ." *Id.* But, in the case of proposed rate increases, FERC may order the utility to "keep accurate account in detail of all amounts received by reason of such increase," and "upon completion of the hearing and decision may by further order require such public utility . . . to refund, with interest . . . such portion of such increased rates or charges as by its decision shall be found not justified." *Id.*

Section 206, 16 U.S.C. § 824e, authorizes FERC or complainants to seek changes in existing rates. Section 206 provides in pertinent part that if FERC finds, "after a hearing," that an existing rate is "unjust, unreasonable, unduly discriminatory or preferential, [FERC] shall determine the just and reasonable rate . . . to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e(a).

Read together, FPA sections 205 and 206 form the basis of the filed rate doctrine and its corollary, the rule against retroactive ratemaking. As petitioners explain, the filed rate doctrine serves two key purposes in this context: (1) it requires public utilities to charge, and buyers to pay, the "filed rate," and (2) it bars FERC from ordering retroactive refunds on the grounds that a utility's filed rate, seen in hindsight, is not "just and reasonable." *See Arkansas*

Louisiana Gas Co. v. Hall ("Arkla"), 453 U.S. 571, 577-78 (1981);[2] *see also* 16 U.S.C. § 824e(b).

As discussed in more detail below, however, this Court has always recognized that the filed rate doctrine only applies if rates were "properly filed" in the first instance. *Arkla*, 453 U.S. at 577. An unfiled tariff, or a tariff that fails to give sufficient notice of rates, does not produce a filed rate that binds buyers and sellers. *Security Services, Inc. v. K Mart Corp.*, 511 U.S. 431, 440-43 (1994).

Further, courts have consistently held that FERC's authority includes the power to order retroactive refunds where a utility either fails to file its rates in the first instance or violates the terms and conditions of a filed tariff, i.e., fails to charge its "filed rate." *E.g., Towns of Concord, Norwood, and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992) (authorizing retroactive refunds on the grounds that a utility imposed "charges not in conformity with its rate schedules"); *Boston Edison Co. v. FERC,* 856 F.2d 361, 369 (1st Cir. 1988) (holding that FERC can "enforce the terms of a filed rate and order refunds for past violations of one").

Courts have cited FPA sections 205, 206, and 309, 16 U.S.C. § 825h, as the sources of FERC's authority to order refunds as a remedy for past violations of the filing requirement and/or a tariff. *Towns of Concord*, 955 F.2d at 72-73; *see also id.* at 73 (canvassing similar grants of authority to other administrative agencies); *Boston Edison,* 856 F.2d at 369-70.

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[2] *Arkla* involved the cognate provisions of the Natural Gas Act ("NGA"). Like the petition, this brief in opposition follows the Court's "established practice of citing interchangeably decisions interpreting the pertinent sections" of the NGA and the FPA. *Arkla*, 453 U.S. at 577 n.7.

B. The Market-Based Rate Regime

In the market-based rate system at issue here, FERC does not require utilities to file their "rates," i.e., prices, before service commences. Instead, FERC reviews applications for "market-based rate authority." If FERC decides that a supplier lacks market power, or has adequately mitigated its market power, it accepts an open-ended, "umbrella" tariff which contains no rates, just a statement that rates will be determined "by agreement" between buyer and seller. *See, e.g., Application of El Segundo Power, L.L.C. for Market-Based Rates*, FERC Docket No. 98-1127, filed Dec. 17, 1997, Exh. A [Proposed Rate Schedule No. 1].[3]

In addition to the tariff, FERC requires suppliers with market-based rate authority to provide, on a quarterly basis, detailed information regarding all their sales and purchases, including the rates they charged. FERC has said that post-transaction, quarterly reporting of rates is necessary to ensure that all rates are on file as required by Section 205, to ensure the supplier's rates are just and reasonable, and to monitor the supplier's ability to exercise market power. *E.g., Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305, at p. 62,406 (1993), *rehearing denied,* 66 FERC ¶ 61,244 (1994); *Morgan Stanley Capital Group, Inc.*, 69 FERC ¶ 61,175, at p. 61,696 (1994).

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[3] FERC approved the proposed tariff in *El Segundo Power, L.L.C.*, 82 FERC ¶ 61,126 (1998).

FERC has further held that suppliers must report their rates on a transaction-specific basis. Each and every sale must be reported, including each sale of power into centralized auction markets operated by the California Power Exchange ("Cal. PX") and the California Independent System Operator ("Cal. ISO"). FERC Stats. and Reg. Preambles ¶ 31,127 at 30,154 (2002) (CCH); *see City of Girard, Kansas v. FERC*, 790 F.2d 919, 922 (D.C. Cir. 1986) (holding that FERC's "jurisdiction over rates encompasses review of *each* rate charged to *each* customer") (emphasis in original).

FERC imposed these reporting requirements on the petitioners and other sellers at the time they sought and obtained market-based rate authority. *E.g., British Columbia Power Exchange Corp.*, 80 FERC ¶ 61,343, at p. 62,141 (1997). FERC's tariff-approval orders contained a standard requirement that transaction-specific detail on all sales be reported no later than 30 days after the end of each calendar quarter. *Louisville Gas & Elec. Co.*, 68 FERC ¶ 61,246, at p. 61,124 (1994); *Southern Co. Services, Inc.*, 75 FERC ¶ 61,130, at p. 61,444 (1996).[4]

C. FERC's Decisions

In the proceedings below, the California Attorney General alleged, *inter alia*, that petitioners and other sellers failed to report transaction-specific information on any of their sales into centralized auction markets administered by the Cal. PX and Cal. ISO during the California energy crisis. Sellers provided only highly aggregated information, which made it impossible to determine the date, duration, quantity, or price of any single sale among the tens of thousands that petitioners and others executed. Complaint of the State of California *ex rel.* Bill Lockyer, Attorney General ("AG Complaint"), FERC Docket No. EL02-71, filed March 19, 2002, pp. 18-23. Petitioners' reports were useless for their intended purpose, which was to facilitate review of rates at a transaction-specific level.

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[4] Petitioners seem to suggest that FERC required some, but not all of them, to report transaction-specific data. Petition at 7. FERC rejected such claims. Pet. App. at 48a-50a.

As a result, during the worst power crisis in the nation's history, the federal agency charged with exclusive jurisdiction to regulate wholesale rates, 16 U.S.C. § 824(a), and with providing a "complete, permanent, and effective bond of protection for consumers," *Atlantic Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 389-90 (1959), lacked the fundamental data required to effectively regulate in the public interest. When FERC opened an investigation into market manipulation claims, nearly two years after the crisis began, FERC staff reviewed the sellers' quarterly reports and determined that they provided no useful information. *See* Notice to All Jurisdictional Sellers and Non-Jurisdictional Sellers in the West, FERC Docket No. PA-02-000, March 5, 2002.[5]

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[5] Market manipulation and market power wielded by power suppliers have been identified as the primary causes of the energy crisis. Leading energy economists, including those cited by petitioners, have concluded that hot weather and other "market fundamentals" do not explain the historically high prices charged from May 2000-June 2001 in California and throughout the western United States. *See* Paul Joskow and Edward Kahn, *A Quantitative Analysis of Pricing Behavior in California's Wholesale Electricity Market During Summer 2000: The Final Word*, Feb. 4, 2002, at 33 (concluding that "there is a very significant gap between actual market prices and competitive benchmark prices that take account of these market fundamentals"); *see also*

(Continued on following page)

In response to the California Attorney General's complaint, FERC held that petitioners and other sellers committed "serious" violations by failing to report transaction-specific detail about their California sales. Pet. App. at 53a.[6] FERC further held, however, that petitioners' reporting violations were technical in nature and did not amount to a defect in the "filed rate" itself.

FERC held that petitioners' market-based rate tariffs, which stated that rates would be determined "by agreement," were lawful filed rates, *id.* at 52a-53a, and that post-performance reporting serves the more limited purpose of facilitating market oversight and monitoring. *Id.* at 48a; *see also id.* at 42a (holding that "[a]fter-the-fact, quarterly reports provide a means for spotting pricing

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Final Report on Price Manipulation in Western Markets, FERC Docket No. PA02-2, March 26, 2003, at ES-1 (detailing manipulation of natural gas prices, which "facilitat[ed] the unprecedented price increase in the electricity market").

Further, California and other complainants presented evidence implicating numerous sellers in a variety of schemes to manipulate the market and/or exercise market power in order to drive up prices. *See, e.g.*, Rebuttal Testimony of Peter Fox-Penner, Exh. CA-349, FERC Docket Nos. EL00-95-000 et al., filed March 20, 2003. Claims alleging market misconduct by various sellers were recently remanded to FERC for further consideration. *Pub. Util. Comm'n v. FERC*, 462 F.3d 1027, 1049 (9th Cir. 2006) (holding that California purchasers presented "significant evidence" of market misconduct).

[6] Petitioners state that quarterly reporting "included, among other things, information on the participants in the transactions, and the price at which power was sold. FERC used that information to reassess its conclusion that the seller lacked, or had mitigated market power." Petition at 7. In reality, sellers did *not* report "the price at which power was sold" in any given transaction. And because sellers did not report such information, FERC could not have "used" it for any purpose.

trends, discriminatory patterns, or other indicia of the exercise of market power").

According to FERC, because petitioners' rates were lawfully filed, "[u]nder Section 206 of the FPA, the Commission currently can institute a refund proceeding only for the refund effective period, which can begin no sooner than 60 days from the date of the Attorney General's March 16, 2002 complaint." *Id.* at 52a; *see also id.* at 53a (holding that "section 206 bars retroactive refunds in this proceeding, or in the EL00-95 proceeding").[7] FERC acknowledged its authority to order retroactive relief where utilities "violate rules in applicable rate tariffs," *id.* at 76a, but concluded that no such relief was available in this case. *Id.*; *see also id.* at 75a.

D. The Ninth Circuit's Remand

The Ninth Circuit rejected the California Attorney General's argument that FERC's filing requirements for market-based rates violate the FPA *per se*. Pet. App. at 10a-12a. But it reversed FERC's determinations that (1) quarterly reporting violations were irrelevant to whether petitioners charged lawful filed rates during the energy crisis, and (2) Section 206 barred FERC from ordering refunds on sales that occurred prior to the filing of the California Attorney General's complaint.

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[7] The California Attorney General filed this case, not under Section 206 of the FPA, but under Rule 206 of FERC's Rules of Practice and Procedure, 18 C.F.R. § 385.206(a), which provides that "Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction." The California Attorney General's complaint sought refunds for alleged violations of Section 205, not refunds under Section 206. AG Complaint at 2, 24-25.

The Ninth Circuit held that post-transaction, quarterly reporting is "essential to a valid administration of the market-based system," Pet. App. at 18a, and is an "integral part" of a supplier's filed rate. *Id.* at 15a; *see also id.* at 14a, 16a, 17a, and 18a. It held, in sum, that a valid rate filing in the context of market-based rates necessarily consists of two distinct parts: (1) the seller's grant of market-based rate authority, memorialized in a tariff stating that rates will be determined "by agreement," and (2) post-transaction reporting of the rates charged. The court further held that utilities must comply with both halves of this "dual requirement," *id.* at 11a, in order to satisfy the statutory command that all rates be filed and posted for public inspection under Section 205.

The court gave several reasons why this must be the case. First, without post-transaction reporting, FERC has no way of knowing whether rates being charged in the market are just and reasonable, and whether competitive market forces are "truly determining the price" of wholesale power. *Id.* at 12a. FERC's prior determination that a seller lacks market power is not sufficient in this regard because it "may bear little or no relation to the realities of subsequent circumstances." *Id.* at 17a.

Second, FERC cannot limit its review of proposed rates to deciding whether a seller lacks market power (a determination that could take place several years before the consummation of any given transaction) because this Court outlawed the same regulatory approach in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218

(1994), and *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 197 (1990). *Id.* at 15a-16a; *see also id.* at 11a. The Ninth Circuit explained that without post-transaction reporting, "effective federal regulation is removed altogether." *Id.* at 15a; *see also id.* (holding that "[w]ithout the required filings, neither FERC nor any affected party may challenge the rate").

Third, the court held that FPA Section 205(e) is "practically speaking, eliminated under the scheme as FERC would have us interpret it." *Id.* at 18a. If the filed rate consisted solely of a market-based rate tariff, utilities could make any number of sales to individual buyers at widely varying prices, but the filed rate would never vary, precluding any opportunity to challenge the legality of any particular rate under Section 205(e). 16 U.S.C. § 824d(e). Any challenges would have to be brought under FPA Section 206, 16 U.S.C. § 824e, in which "the only remedies are prospective, and, for that matter, unavailable for a period of 60 days pursuant to § 206(b) . . . Such an interpretation comports neither with the statutory text nor with the Act's 'primary purpose' of protecting consumers." Pet. App. at 18a; *see infra* n.12.

Finally, the court rejected FERC's (and petitioners') conception of the filed rate in this case because it contradicted other pronouncements by FERC on the subject. *Id.* at 12a. FERC repeatedly held elsewhere that quarterly reporting is "necessary" to ensure compliance with Section 205. *Id.* (citing *Enron Power Marketing*, 65 FERC ¶ 61,305 (1993)); *see also, e.g.*, *Louisville Gas & Elec. Co.*, 68 FERC ¶ 61,247, at p. 62,124 (1994); *Southern Co. Services, Inc.*, 75 FERC ¶ 61,130 (1996); *Morgan Stanley Capital Group, Inc.*, 72 FERC ¶ 61,082 (1995); *Reporting Requirements* *and Fees Applicable to Power Marketers*, 80 FERC ¶ 61,373 (1997).

The court further held that FERC possesses "broad remedial authority" to order refunds or other monetary remedies on the grounds that sellers violated the dual requirement for filing their market-based rates under Section 205. *Id.* at 14a. The Ninth Circuit explained that FERC "possesses authority to impose retroactive refunds for § 205 violations," Pet. App. at 18a, and that this case cannot be meaningfully distinguished from previous cases in which FERC ordered utilities to pay refunds on past sales on the grounds that they had "violated § 205, either by violating the terms of an accepted rate, or by charging rates without first seeking approval under FPA § 205." *Id.* at 14a-15a and 18a (citing *Delmarva Power & Light Co.*, 24 FERC ¶61,199 (1983); *The Washington Water Power Co.*, 83 FERC ¶ 61,097 (1998)).

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REASONS WHY THE PETITION SHOULD BE DENIED

A. The Decision Below Rests On Ferc's Well-Established Authority To Order Refunds On Past Sales In The Face Of Section 205 Violations.

The Ninth Circuit held that petitioners and other sellers violated both Section 205 and a condition of their market-based rate tariffs by failing to report the rates they charged during the energy crisis. FERC's authority to remedy such violations by ordering retroactive refunds is well-established. Far from posing any conflict, the Ninth Circuit's holding that refunds are available comports fully with the text and legislative history of the FPA, this

Court's decisions, and decisions of the circuit courts, including the D.C. Circuit.

1. As noted previously, the filed rate doctrine only protects "properly filed" rates. *Arkla*, 453 U.S. at 577; *see also Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 (1986) (holding that the filed rate doctrine protects "duly submitted, lawful rates"). The filed rate doctrine is "not even implicated" in the absence of properly filed rates. *Square D,* 409 U.S. at 422 n.29.[8]

This Court has further held that a properly filed rate must give sufficient notice of the rate to be charged, or at a minimum support a "reliable calculation of charges." *Security Services*, 511 U.S. at 443; *see also Maislin*, 497 U.S. at 126 (the purpose of rate filings is to render rates "definite and certain"). If a utility failed to file its rate in the first instance, or its filed tariff is missing an "essential element," such that the tariff fails to give adequate notice of the rate to be charged, the filed rate doctrine does not apply. *Security Services*, 511 U.S. at 440-43; *see, e.g., In re Olympia Holding Corp. v. Frito-Lay, Inc.*, 88 F.3d 952, 961 (11th Cir. 1996).

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[8] This has been the law since at least *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915), in which the Court held that only a "duly filed" rate binds buyers and sellers. *See also, e.g., AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 230 (1998) (Rehnquist, C.J., concurring) (filed rate doctrine only bars challenges to "the rate that respondents had filed in their tariff"); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Comm'n*, 341 U.S. 246, 258 (1951) (Frankfurter, J., dissenting) ("Congress did not intend either court or Commission to have the power to award reparations on the ground that a *properly* filed rate or charge has in fact been unreasonably high or low. . . .") (emphasis added).

Further, where a utility violates Section 205, either by failing to file its rate or violating the terms and conditions of its filed rate, FERC has ample authority to order refunds, that is, to make sellers return the difference between the rate that was charged and a just and reasonable rate. *Towns of Concord,* 955 F.2d at 72-73; *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 972-73 (D.C. Cir. 2003); *Southern Cal. Edison Co. v. FERC*, 805 F.2d 1068, 1070-72 (D.C. Cir. 1986); *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1551 (D. C. Cir. 1985); *East Tenn. Natural Gas Co. v. FERC*, 631 F.2d 794, 798-800 (D.C. Cir. 1980); *Pub. Util. Comm'n v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006); *see also, e.g., Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 656 (3d Cir. 2003); *Aron v. Penn. R. Co.*, 80 F.2d 100, 102 (2d Cir. 1935).

The circuit courts have held that Section 309 of the FPA, 16 U.S.C. § 825h, read in conjunction with Sections 205 and 206, gives FERC this power. *E.g.*, *Towns of Concord* at 72-73; *Boston Edison*, 856 F.2d at 369-70; *Pub. Util. Comm'n*, 462 F.3d at 1045. Section 309 expressly authorizes FERC to "perform any and all such acts . . . as it may find necessary or appropriate to carry out the provisions of the [FPA]," 16 U.S.C. § 825h, including the statutory requirements that utilities file their rates in tariffs, and adhere to the terms and conditions of their filed tariffs.

FERC has exercised its authority to order retroactive relief for Section 205 violations on numerous occasions. *E.g.*, *Carolina Power & Light Co.*, 17 FERC ¶ 61,118, at p. 61,237 (1981); *Electric Cooperatives of Kansas*, 14 FERC ¶ 61,176, at p. 61,230 (1980); *Pub. Serv. Co. of New Hampshire*, 1 FERC ¶ 63,039, at p. 65,294 (1977). FERC has said it cannot even "conceive of a reasonable basis" for preventing it from ordering retroactive relief to remedy violations of a filed tariff. *Cities and Villages of Albany and Hanover, Ill. et al.*, 61 FERC ¶ 61,037, at p. 61,186 (1991) (citing *North Carolina Elec. Membership Corp. et al. v. Carolina Power & Light Co.*, 57 FERC ¶ 61,332, at p. 62,065 (1991). Indeed, if FERC had no power to order refunds in the face of Section 205 violations, the filing requirement, which is the "essential characteristic of a rate regulated industry," *MCI*, 512 U.S. at 231, would be largely unenforceable.

The Ninth Circuit held here that an "integral part" of petitioners' tariffs, i.e., the rates themselves, were missing due to reporting violations. Pet. App. at 14a, 15a, 16a, and 17a; *see Security Services*, 511 U.S. at 440 (holding a filed tariff invalid on the grounds that it lacked an "essential element," making it impossible to determine the applicable rate). The Ninth Circuit further held that, "[p]ragmatically, under such circumstances, there is no filed tariff in place at all." Pet. App. at 15a; *see Security Services*, 511 U.S. at 440 (holding that "in effect [the carrier] had no rates on file" because its tariff did not disclose the applicable rate).

Thus, the Ninth Circuit's remand to FERC for "refund proceedings," Pet. App. at 2a, poses no conflict with the FPA or any decision of this Court or the circuit courts. The court simply concluded that FERC has the power to order refunds on rates that were not properly filed due to reporting violations, and there is nothing "pernicious," Petition at 27, about that. Indeed, petitioners do *not* dispute FERC's authority to order retroactive refunds where utilities violate Section 205 or the terms and conditions of a filed tariff. *See* Petition at 19 n.33.[9]

In sum, far from "ignoring" the filed rate doctrine, Petition at 2, the Ninth Circuit sought to promote the doctrine's purposes by reminding FERC of its authority to remedy widespread and "egregious" violations of the filing requirement, Pet. App. at 15a, which was "Congress's chosen means of preventing unreasonableness and discrimination in rates." *MCI*, 512 U.S. at 230.

2. Petitioners misstate the Ninth Circuit's holding to create the appearance of a conflict where none exists. The court did *not* hold that the filed rate doctrine applied despite sellers' reporting violations. Petition at 23-24 n.39. Rather, the court held that the market-based rate system does not violate the FPA *"per se," id.* at 12a, and that it produces properly filed rates if, and only if, sellers report their transaction data to FERC, and FERC treats those reports as an integral part of the filed rate. Because petitioners only complied with one half of the dual requirement

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[9] Contrary to petitioners' claim, Congress did not "[decline] to amend the FPA to create the very refund authority" that the Ninth Circuit invoked. Petition at 21. Congress rejected an amendment that would have permitted an earlier "refund effective date" in future complaint proceedings under Section 206 of the FPA. *See* Petition at 21. That has no bearing on the Ninth Circuit's holding that FERC has the power to order retroactive refunds for petitioners' violations of Section 205 and of a critically important condition of their tariffs in this case. Congress was presumably aware of the Ninth Circuit's decision (which was issued September 9, 2004), but did nothing to cast any doubt on its validity.

for filing their market-based rates, they violated Section 205 and cannot invoke the filed rate doctrine.[10]

Petitioners have explained the court's holding in just that way elsewhere. In their request for rehearing or rehearing *en banc* in the Ninth Circuit, petitioners argued that the panel erred by "linking quarterly, post-transaction filings to the determination of whether there is a 'filed tariff in place,'" and "signal[ing] that pre-authorized MBR sales that were misreported *lack filed rate protection.*"

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[10] The court made the basis of its holding clear by stating, *inter alia*, that "[p]ragmatically, under such circumstances, there is no filed tariff in place at all." *Id.* at 15a. Without quarterly reporting, petitioners' tariffs failed to "pass legal muster." *Id.*; *see also id.* at 13a (holding that the "very mechanism that distinguished [petitioners'] tariffs from those prohibited by the Supreme Court in *MCI* and *Maislin* was, for all practical purposes, non-existent."

More specifically, the court held that the lack of sufficiently detailed reporting "undermined" the filed rate doctrine by making it "impossible to review the reasonableness of privately negotiated, unfiled rates." *Id.* at 15a. Similarly, it held that reporting violations made it impossible for either FERC or the public to "challenge the rate[s]" charged by petitioners. *Id.*

In addition to making clear that petitioners charged "unfiled rates," Pet. App. at 15a, the Court held that FERC has authority to order refunds on past sales for "§ 205 violations," *id.* at 18a, and that FERC's decisions in *Washington Water Power* and *Delmarva* control here. *Id.* at 14a-15a, 18a. In *Washington Water Power*, FERC ordered retroactive relief where a utility and an affiliated power marketer violated a condition of FERC's order granting market-based rate authority that was deemed essential to ensure the reasonableness of rates. 83 FERC ¶ 61,097, at p. 61,464 (Show Cause Order); 83 FERC ¶ 61,282, at p. 62,169 (1998) (Order on Responses to Show Cause Order). In *Delmarva*, FERC ordered retroactive relief where a utility imposed certain costs on customers without making the required filing under Section 205. 24 FERC ¶ 64,199, at p. 61,461, *rehearing denied*, 24 FERC ¶ 61,380 (1983). FERC held there that failing to order refunds would allow utilities to "flout our regulations, and overcharge consumers with impunity." 24 FERC, at p. 61,461.

Petition for Rehearing and Suggestion for Rehearing En Banc of Indicated Intervenors, filed Oct. 25, 2004, p. 19 (emphasis added). They further argued that the panel "misapprehends the distinction between the function of an MBR tariff, which is the filed rate under section 205(c), 16 U.S.C. § 824d(c), and the function of quarterly reports as a method of monitoring rates." *Id.* at 8.[11] Thus, petitioners clearly understand that, under the Ninth Circuit's holding, the filed rate doctrine does not apply in the absence of sufficiently detailed, post-performance reporting, and their belated claims to the contrary should be disregarded.

Petitioners argue that the court could not have based its holding on a finding that sellers violated Section 205 and a condition of their tariffs because it did not expressly cite Section 309 as the source of FERC's authority to order refunds. Petition at 19 n.33. This logic fails. The court plainly held that FERC "possesses authority to impose retroactive refunds for § 205 violations," Pet. App. at 18a, and relied on a line of cases involving the imposition of refunds or other monetary relief as a remedy for Section 205 violations.[12]

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[11] All of the petitioners except Portland General Electric Company and AES Placerita, Inc. joined in the request for rehearing in the Ninth Circuit.

[12] Petitioners also mistakenly rely on the court's statement that a market-based rate tariff is permitted only "[i]f, on the other hand, we view the reporting requirements as integral to the tariff, with implied enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable, and discriminatory rates. . . ." Petition at 23 n.39 (quoting Pet. App. at 16a). That language refers not to the source of FERC's power to remedy Section 205 violations, Pet. App. at 14a-15a, 18a, but to the court's concerns about FERC's procedures for *initially* reviewing the reasonableness of rates in the market-based rate scheme. *See* Pet. App. at 18a

(Continued on following page)

In sum, as petitioners themselves argued on rehearing in the Ninth Circuit, the opinion holds that an unreported rate "lacks filed rate protection," and there is nothing in the law that precludes FERC from order retroactive refunds in such circumstances.

B. Petitioners Did Not Properly File Their Rates Under Any Theory; Therefore, The Judgment Is Valid Regardless of the Reasons Given By The Ninth Circuit.

The petition hinges on an assumption that market-based rate tariffs produce valid filed rates. Public utilities have no "contractual reliance interests," Petition at 2, in rates they failed to properly file with FERC. *E.g., Security Services*, 511 U.S. at 440-43. Similarly, if petitioners did not properly file their rates, there is no possibility that FERC could "impose retroactive refunds not contemplated by Congress," Petition at 2, because the filed rate doctrine only bars retroactive refunds on "properly filed" rates.

(holding that FPA Section 205(e) fails to operate in the scheme "as FERC would have us interpret it"); *supra* at 11.

In order to avoid an interpretation that would cut Section 205(e) out of the scheme entirely, the court held that FERC must provide "substitute" procedures and remedies for the public to obtain an *initial* review of the reasonableness of rates, i.e., a review that occurs outside the confines of a proceeding under FPA Section 206. Pet. App. at 16a. Petitioners argue that any such "substitute" procedures would violate the FPA, but the issue is not properly presented here.

The Ninth Circuit had no occasion to address the particulars of any "substitute" procedures and remedies for initially reviewing rates charged in the market because, due to widespread reporting violations, petitioners and other sellers only complied with one-half of the "dual requirement" for filing their market-based rates. As a result, there was effectively "no filed tariff in place at all" that could be challenged under such "substitute" procedures.

E.g., Arkla, 453 U.S. at 577. In this case, however, rates were not properly filed under *any* theory. The plain wording and legislative history of the FPA, as well as numerous decisions of this Court and the Court of Appeals for the District of Columbia, leave no room for doubt about that. This provides an alternate ground to support the judgment, obviating any need for further review by this Court.

As discussed in more detail in the conditional cross-petition ("cross-petition") filed by the California Attorney General,[13] a tariff which states only that rates will be determined "by agreement," and contains no ascertainable rates, violates the statutory requirement that utilities file schedules "showing all rates and charges for any transmission or sale subject to the jurisdiction of [FERC]." 16 U.S.C. § 824d(c)-(d); *see Electrical Dist. No. 1. v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985) (Scalia, J.); *Southwestern Bell Corp. v. FCC,* 43 F.3d 1515, 1519-21 (D.C. Cir. 1995); *Regular Common Carrier Conference v. United States,* 793 F.2d 376, 379-80 (D.C. Cir. 1986) (Scalia, J.).[14]

FERC's prior determinations that petitioners and others could not exercise market power, *see* Petition at 18, does not cast any doubt on the validity of the judgment. This Court has held on two previous occasions that the existence of competition does not justify reliance on unfiled, privately negotiated rates. *MCI*, 512 U.S. at 230-31; *Maislin*, 497 U.S. at 132; *see also Southwestern Bell*, 43

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[13] In order to avoid unnecessary duplication, the California Attorney General hereby incorporates by reference pages 4-12 of the cross-petition and summarizes the key points here.

[14] *See* Richard Stavros, *Lost in Translation*, PUBLIC UTILITIES FORTNIGHTLY, June 1, 2004, at 4 (the California Attorney General "argues a valid point: that there really is no 'filed rate' ").

F.3d at 1520 (holding that a common carrier's inability to exercise market power is "ultimately irrelevant" to a tariff's validity).

Nor does FERC's authority to prescribe the timing of rate filings, 16 U.S.C. § 824d(c), convert petitioners' market-based rate tariffs to valid filed rates, on the theory that post-transaction reporting "completes" the filing. If rates could be publicized after-the-fact, the public would have no means of challenging any given rate *before* it takes effect under Section 205(e). 16 U.S.C. § 824d(d)-(e). Such a scheme cannot be reconciled with the text, structure, or legislative history of the FPA. *See MCI*, 512 U.S. at 230-31; *Maislin*, 497 U.S. at 132.

Because sellers did not properly file their rates as a matter of law, the Ninth Circuit's remand would still be valid, even accepting for the sake of argument petitioners' interpretation of the holding. The Ninth Circuit ordered FERC to reinstate the California Attorney General's request for refunds. Pet. App. at 2a. That is the appropriate disposition of the case regardless of the reasons given by the court.

C. Petitioners Fail To Show Any Exigency Requiring Intervention By This Court.

Petitioners argue heatedly that the Ninth Circuit's decision will stifle the "growth and competitiveness of the nation's power markets," Petition at 27, and "wreak havoc" on FERC's ability to conclude various regulatory proceedings relating to the energy crisis. *Id.* at 29. *Lockyer* was decided more than two years ago, however, and none of these threats has materialized. And petitioners provide no evidence that the future bodes any differently.

1. Petitioners argue that FERC has embraced the Ninth Circuit's supposed "aggrandizement of [its] power," and that FERC plans to "extend the destabilizing effects of the Ninth Circuit's pernicious reading of the FPA to other parts of the country. . . ." Petition at 27. But petitioners cite no cases in which FERC has signaled such an intent, or even a single case in which FERC has interpreted the holding in *Lockyer* to mean that FERC has a generalized grant of authority under Section 205 to order retroactive refunds on properly filed rates.

Petitioners cite a statement by FERC's former chairman, who expressed his belief that the Ninth Circuit provided the Commission "broader refund authority" than it thought it had. *Id.* at 26. But there is nothing nefarious about that. FERC simply ruled it had no authority to order refunds under the circumstances of this case, and the Ninth Circuit reversed.

Petitioners also argue that another panel of the Ninth Circuit has "extended" the holding in this case in a way that makes it impossible for public utilities to invoke the *Mobile-Sierra* doctrine. Petition at 29. In fact, the decisions cited by petitioners expressly leave it up to FERC to determine the appropriate standard of review on remand, *i.e.*, to decide whether the *Mobile-Sierra* standard should apply or not. *Pub. Util. Dist. No. 1 v. FERC*, Nos. 03-72511 et al., 2006 WL 3717533, at *34 (9th Cir. Dec. 19, 2006); *Pub. Util. Comm'n v. FERC*, Nos. 03-74207 & 03-74246, 2006 WL 3717673, at *7 (9th Cir. Dec. 19, 2006).

2. Petitioners claim that *Lockyer* will "likely have a chilling effect on future investment," Petition at 28, but they provide no evidence of any such effect traced to the decision, which was issued more than two years ago. (Of

course, a variety of complex factors influence the investment climate in wholesale power markets.)

As petitioners point out, FERC reported to Congress on the need to "restor[e] confidence in California markets. . . ." Petition at 28. But the same report cites the *Lockyer* decision (in a footnote) without suggesting in any way that it poses a threat to future investment by gutting the filed rate doctrine, as petitioners claim. FERC, Report to Congress, dated Dec. 27, 2005, p. 14.[15]

3. Finally, petitioners' claim that the *Lockyer* decision will hamstring FERC's ability to conclude various regulatory proceedings is spurious. Petition at 29. Numerous energy crisis settlements have been executed and approved by FERC since the *Lockyer* decision was issued.[16]

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[15] California has gained considerable amounts of new generating capacity since *Lockyer* was decided, and the California Energy Commission ("CEC") has either approved, or is considering, applications to construct thousands of additional megawatts of capacity. According to the CEC, generators brought a total of 4,597 megawatts ("MW") of new capacity "on line" in California in 2005 and 2006 – an average of 2,299 MW. By comparison, from 2001-2004, the period preceding *Lockyer*, the state gained an average of 2,134 MW per year. *See* California Energy Commission, *Energy Facility Status,* updated Jan. 8, 2007 (accessible on the Internet at www.energy.ca.gov/sitingcases/all_projects.html#approved).

[16] *San Diego Gas & Elec. Co.*, 115 FERC ¶ 61,230 (settlement with IDACORP), *rehearing denied*, 117 FERC ¶ 61,020 (2006), petition for review pending *sub nom. Port of Seattle v. FERC*, No. 06-75044 (9th Cir. Oct. 25, 2006); *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,308 (2005) (settlement with Reliant Energy, Inc. et al.), *rehearing denied,* 115 ¶ 61,271 (2006), *petition for review pending sub nom. Port of Seattle v. FERC*, No. 06-72957 (9th Cir. June 7, 2006); *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,235 (2005) (settlement with Public Service Co. of Colorado); *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,171 (2005) (settlement with Enron Power Marketing, Inc. et al.), *rehearing denied,* 115 FERC ¶ 61,032 (2006), *petition for review pending Port of Seattle v. FERC*, No. 06-72649 (9th Cir. May 23, 2006); *San Diego Gas & Elec.*

(Continued on following page)

Combined, these settlements cover roughly half of all the sales that occurred in California during the energy crisis and are worth billions of dollars.

California and other refund claimants recently submitted an additional settlement to FERC for its approval,[17] several more settlements will be filed shortly, and negotiations are active and ongoing with a number of other sellers.[18] Petitioners' claims about *Lockyer*'s purported impact on FERC's exercise of its regulatory responsibilities do not withstand scrutiny.

In sum, petitioners have failed to show that *Lockyer* has caused, or will cause, any adverse commercial or regulatory consequences. The Ninth Circuit's decision may be a critical one for the petitioners, who are still embroiled in several cases arising out of the energy crisis and are hoping this Court will provide them additional leverage at the bargaining table with California by granting review. But it is not a critical one for the nation's power supply.

◆

Co., 111 FERC ¶ 61,017 (settlement with Mirant Corp. et al.), *rehearing denied*, 111 FERC ¶ 61,354 (2006); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257 (2004) (settlement with Duke Energy North America Corp., et al.), *rehearing denied*, 111 FERC ¶ 61,186 (2006).

[17] *Joint Offer of Settlement*, FERC Docket No. EL00-95-000 et al., filed Aug. 9, 2006 (proposed settlement with Eugene Water & Electric Board).

[18] *See* Letter from Lisa J. Evans, Mediator, Ninth Circuit Court of Appeals, dated Jan. 25, 2007 (expressing pleasure that "several settlements have been reached during the settlement 'time out'" ordered by the court, and noting that these settlements "will be filed with FERC in the near future").

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: February 5, 2007

Respectfully submitted,

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SUPREME COURT, U.S.

Nos. 06-888 and 06-1100

In the Supreme Court of the United States

CORAL POWER, L.L.C., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA EX REL. EDMUND G. BROWN, JR., ATTORNEY GENERAL OF CALIFORNIA, ET AL.

STATE OF CALIFORNIA EX REL. EDMUND G. BROWN, JR., ATTORNEY GENERAL OF CALIFORNIA, PETITIONER

v.

CORAL POWER L.L.C., ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission has statutory authority to assess refunds of payments made under market-based rate tariffs for electricity, where the sellers have failed to comply with the reporting requirements associated with market-based rate tariffs.

2. Whether the Federal Energy Regulatory Commission's market-based rate program is consistent with the Federal Power Act, 16 U.S.C. 791a *et seq.*

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In the Supreme Court of the United States

No. 06-888

CORAL POWER, L.L.C., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA EX REL. EDMUND G. BROWN, JR., ATTORNEY GENERAL OF CALIFORNIA, ET AL.

No. 06-1100

STATE OF CALIFORNIA EX. REL. EDMUND G. BROWN, JR., ATTORNEY GENERAL OF CALIFORNIA, PETITIONER

v.

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ON PETITION AND CROSS-PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 383 F.3d 1006.[1] The orders of the Federal Energy Regulatory Commission (Pet. App. 20a-60a, 61a-79a) are reported at 99 F.E.R.C. ¶ 61,247, and 100 F.E.R.C. ¶ 61,295.

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[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 06-888.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2004. A petition for rehearing was denied on July 31, 2006 (Pet. App. 80a-81a). On October 23, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 28, 2006, and the petition in No. 06-888 was filed on that date. The petition was placed on the docket on January 4, 2007, and a conditional cross-petition for a writ of certiorari in No. 06-1100 was filed on February 5, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (Commission or FERC) jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1).

Proposed rates for the sale or transmission of power within FERC's jurisdiction are subject to FERC review to ensure that they are "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). To this end, the FPA provides that, "[u]nder such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, * * * schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission." 16 U.S.C. 824d(c).

FERC may suspend a proposed rate for up to five months pending an investigation of its lawfulness. See 16 U.S.C. 824d(e) If no decision is reached by the end of the suspension period, the proposed rate will go into effect, but it may be placed into effect subject to refund. See *ibid.*

If, after a hearing—either on its own motion or based on a complaint—FERC determines that any existing rate or charge is unjust or unreasonable, it must determine and fix by order the just and reasonable rate or charge "to be thereafter observed and in force." 16 U.S.C. 824e(a). FERC also may "order the [seller] to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate." 16 U.S.C. 824e(b). At the time of the proceeding at issue here, the "refund effective date" could be no earlier than 60 days after a complaint was filed or 60 days after publication of the Commission's intent to initiate a proceeding on its own motion. *Ibid.*[2]

FERC also has the general authority "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter." 16 U.S.C. 825h. Invoking that power, the Commission may determine remedies for violations of tariffs, including the award of disgorgement (*i.e.*, refunds) of unjust profits. See *Consolidated Edison Co. of N.Y., Inc.* v. *FERC*, 347 F.3d 964, 967 (D.C. Cir. 2003); *Town of Concord* v. *FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992).

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[2] The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, amended the FPA to give FERC an additional 60 days of refund authority. The "refund effective date" is now the date on which the complaint was filed or on which the Commission announced its intent to initiate a proceeding on its own motion. See *id.* § 1285, 119 Stat. 980 (to be codified at 16 U.S.C. 824e(b) (Supp. V 2005)).

2. Until the 1980s, the Commission established rates primarily on a cost-of-service basis. As barriers to entry in the generation sector declined, however, a competitive market for wholesale sales of electricity began to develop. In response to those developments, the Commission began considering and approving market-based rates for wholesale electricity sales in the late 1980s.

Under the Commission's market-based rate program, the Commission approves a seller's request to sell electricity at market-based rates only if it first finds that the seller and its affiliates either do not have market power or have adequately mitigated their market power. Pet. App. 9a-10a. Market power is defined as a seller's ability to "significantly influence price in the market by withholding service and excluding competitors for a significant period of time." *Id.* at 10a n.4 (quoting *Citizens Power & Light Corp.*, 48 F.E.R.C. ¶ 61,210, at 61,777 (1989)). The Commission's approach is designed to assure just and reasonable rates because in "a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable." *Id.* at 10a (quoting *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990)).

In order to ensure that the Commission can monitor, on a continuing basis, that market-based rates remain just and reasonable and that the markets are not subject to manipulation, the Commission also imposes ongoing quarterly reporting requirements for market transactions. Pet. App. 10a-11a. The quarterly reporting requirement provides a means for the Commission and the public to spot pricing trends or discriminatory patterns that might suggest the exercise of market power. *Id.* at 42a. For each purchase and sale contract, marketers are required to report the buyer's or seller's name, a description of the service, the delivery point for the service, the price, the quantities to be served or purchased, the contract's duration, and any other attributes of the product being purchased or sold that contribute to its market value. *Id.* at 49a.

After-the-fact reporting allows the market to operate initially without regulatory intrusion, avoiding the costs that would be associated with prospective review of a large number of transactions, many of which are of short duration. Pet. App. 46a. At the same time, the reporting requirement provides the Commission with information with which it can monitor and oversee the rates being charged, and it places sellers on notice that their transactions will be subject to review and, if necessary, to remedial action, including the possible revocation of their market-based rate authorization. *Ibid.* Further, upon finding a tariff violation, the Commission may take retroactive action, including ordering the disgorgement of unjust profits. *Id.* at 76a.

3. In 1995, in response to retail electricity rates that were well above the national average, California comprehensively restructured its electric energy industry. At that time, the major traditional investor-owned utilities were vertically integrated; that is, they owned generating resources, transmission lines, and distribution facilities. Pet. App. 2a & n.2. Under the restructuring, those utilities were required to divest most of their generating assets and to purchase power at market-based rates through an independent power exchange, which

organized the wholesale market, and an independent system operator, which managed the transmission network. Most (but not all) wholesale sellers participating in the organized markets were public utilities that were required to obtain market-based rate authorization from the Commission, and all sellers participating in the organized markets were subject to FERC-approved market rules governing the power exchange and the transmission-system operator. See generally *Public Util. Dist. No. 1* v. *Dynegy Power Mktg., Inc.*, 384 F.3d 756, 758-759 (9th Cir. 2004), cert. denied, 545 U.S. 1149 (2005); see also *California ex rel. Lockyer* v. *Dynegy, Inc.*, 375 F.3d 831, 835-836 (9th Cir. 2004), cert. denied, 544 U.S. 974 (2005).

As part of California's restructuring plan, in 1996, California's three major investor-owned utilities filed applications with FERC seeking authority to sell electric energy at wholesale at market-based rates. In accordance with its established policy, FERC approved their requests for market-based rate authority after finding that the companies and their affiliates either did not have, or had adequately mitigated, market power. See, *e.g.*, *Pacific Gas & Elec. Co.*, 81 F.E.R.C. ¶ 61,122, at 61,437, 61,537, 61,572 (1997). FERC also reviewed and approved applications by other wholesale generators and suppliers that lacked, or had adequately mitigated, market power to sell electric energy at market-based rates in the California markets.

For several years, the restructured California electricity markets operated largely as intended. Starting in the summer of 2000, however, wholesale electricity prices in California increased significantly; utilities incurred billions of dollars in debt; and the independent system operator declared dozens of system emergencies and occasional rolling blackouts. See generally *In re California Power Exch. Corp.*, 245 F.3d 1110, 1115 (9th Cir. 2001).

Acting in response to a complaint filed on August 2, 2000, FERC took steps to remedy that situation. Specifically, it implemented structural and pricing reforms to make California and Western electricity markets more stable and less susceptible to price spikes. See, *e.g.*, *California Power Exch. Corp.*, 245 F.3d at 1114-1116; *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 93 F.E.R.C. ¶ 61,294, at 61,983 (2000). As a result of these measures and other factors, by early June 2001, prices in California spot and forward markets fell back to preexisting competitive levels. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Serv.*, 95 F.E.R.C. ¶ 61,418, at 62,546 (2001).

FERC also established a proceeding (the Refund Proceeding) to determine refunds owed by suppliers in the California spot markets for sales at unjust and unreasonable rates. See generally *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Serv.*, 96 F.E.R.C. ¶ 61,120 (2001) (*San Diego*). See also *Public Utils. Comm'n* v. *FERC*, 462 F.3d 1027 (9th Cir. 2006); *Bonneville Power Admin.* v. *FERC*, 422 F.3d 908 (9th Cir. 2005). At the time, the statute established the earliest refund date as 60 days following the filing of a complaint with FERC, so the Commission began the refund period as of October 2, 2000. See 16 U.S.C. 824e(b); see also note 2, *supra*. FERC has the authority to direct additional remedies—including the disgorgement of profits—for tariff violations occurring during any time period. But at the time the Refund Proceeding was established, the Commission found that no violation of sellers' market-based rate tariffs had yet been demonstrated. See, *e.g.*, *San Diego*, 96 F.E.R.C. at 61,507-61,508; see also FERC: *Report to Congress, The Commission's Response to the California Electricity Crisis and Timeline for Distributions of Refunds* at 9-11, 20-26 (2005) <http://www.ferc.gov/legal/staff-reports/comm-response. pdf> (*Report to Congress*) (discussing conduct of Refund Proceeding and providing estimated timeline for completion of distribution of refunds); *Public Utils. Comm'n* v. *FERC*, No. 01-71934 (9th Cir.) (appeals of FERC orders computing specific refunds).

In early 2002, after uncovering evidence that one market participant, Enron, had abused its market-based pricing authority, FERC initiated a separate, broad-based investigation into whether any entity manipulated short-term prices in Western energy markets during the period beginning January 1, 2000. See *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 F.E.R.C. ¶ 61,165 (2002). FERC staff obtained data from all segments of the industry and identified instances of alleged market-power abuses and tariff violations. Based on the staff's findings, the Commission initiated several formal proceedings to examine instances of potential wrongdoing and to take appropriate remedial action, regardless of when the wrongdoing occurred. See, *e.g.*, *American Elec. Power Serv. Corp.*, 103 F.E.R.C. ¶ 61,345 (2003) (initiation of show-cause proceedings on possible gaming and anomalous market behavior), reh'g denied, 106 F.E.R.C. ¶ 61,020 (2004), appeals pending *sub nom. Pacific Gas & Elec. Co.* v. *FERC*, No. 05-71008 (9th Cir. filed Feb. 25, 2005) (in abeyance).

FERC subsequently has approved or facilitated numerous settlements providing for over $6 billion in refunds for alleged market manipulation or excessive rates in the West during 2000 and 2001. See *Report to Congress* 13-20. Efforts are still underway to negotiate settlements of the remaining disputes. See *Public Utils. Comm'n* v. *FERC*, No. 01-71051 (9th Cir. Feb. 16, 2007) (order noting that "settlement efforts are continuing" and directing court mediator to "continue overseeing and exploring with the parties possible resolution through mediation").

4. In the proceeding below, the State of California filed a complaint with FERC alleging that the Commission's market-based rate filing requirements violate the FPA. Pet App. 20a-79a. California also alleged that even if the Commission's market-based rate requirements are valid, the quarterly reports actually filed by generators and marketers selling into certain California markets during the 2000-2001 energy crisis did not contain required transaction-specific information. *Ibid.*

The Commission granted the complaint in part, finding that those quarterly filings that reported aggregated, rather than transaction-specific, data did not comply with 16 U.S.C. 824d(c), or with the Commission's after-the-fact reporting requirements. In particular, the Commission determined that energy suppliers Williams, Dynegy, Mirant, and Reliant, and perhaps other suppliers, failed to comply with the Commission's reporting requirements for the fourth quarter of 2000 and all four quarters of 2001. Pet. App. 50a-51a. To cure the non-compliance, the Commission directed marketers and other public utility sellers to re-file past reports and to file all future reports to show non-aggregated data. *Id.* at 51a.

The Commission denied California's request for refunds, finding that the failure to report transactions in the proper format was "essentially a compliance issue," and that "the sellers' re-filing of quarterly reports to include transaction-specific data is an appropriate and sufficient remedy." Pet. App. 53a-54a. FERC also noted that 16 U.S.C. 824e permits it to institute a refund proceeding only for the refund effective period, commencing after the filing of a complaint or the initiation of a refund proceeding on the Commission's own motion. Pet. App. 52a. Thus, the Commission found that it was precluded from ordering refunds for transactions prior to the date California filed its complaint—that is, March 16, 2002. *Ibid.* California argued that retroactive refunds were permissible because the reporting deficiencies meant, in effect, that no rates were lawfully on file. The Commission rejected that theory, concluding that the tariffs authorizing market-based rates—and not the quarterly reports required by FERC's rules—constituted the filed rate. *Id.* at 53a.

5. The court of appeals granted California's petition for review in part, denied it in part, and remanded the case to FERC for further proceedings. Pet. App. 1a-19a.

The court held that the Commission's market-based rate program generally satisfied the notice and filing requirements of 16 U.S.C. 824d, because it included "the dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements." Pet App. 11a. In so holding, the court distinguished the Commission's market-based rate program from market-based rate programs previously administered by the Federal Communications Commission and the Interstate Commerce Commission, which were set aside by this Court. *Id.* at 10a (citing *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218 (1994), and *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497

U.S. 116 (1990)). The court explained that those programs "relied on market forces alone," whereas the Commission conducted both before-the-fact and after-the-fact review of market conditions "to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." Pet. App. 10a-11a.

As to the years and markets in question, however, the court observed that "non-compliance with FERC's reporting requirements was rampant" and the Commission consequently lacked the information necessary for effective after-the-fact monitoring. Pet. App. 12a. Accordingly, the Commission's "ability to monitor the market, or gauge the 'just and reasonable' nature of the rates [was] eliminated," *id.* at 15a, at a time when "the California energy market was subjected to artificial manipulation on a massive scale." *Id.* at 13a.

The court rejected the Commission's position that it lacked authority, under those circumstances, to order refunds retroactively based on reporting failures. Pet. App. 14a. Instead, it held that "FERC possesses broad remedial authority to address anti-competitive behavior." *Ibid.* As "the reporting requirements were an integral part of a market-based tariff," *id.* at 15a, the court determined that FERC possessed the authority to order retroactive refunds to address violations of the tariff. "The power to order retroactive refunds when a company's non-compliance has been so egregious that it eviscerates the tariff is inherent in FERC's authority to approve a market-based tariff in the first instance." *Ibid.*

The court declined to order refunds itself, noting that "[i]t is more appropriate for FERC to reconsider its remedial options in the first instance." Pet. App. 18a. It emphasized that the Commission, on remand, "may elect not to exercise its remedial discretion by requiring refunds." *Id.* at 15a.

ARGUMENT

Petitioners contend (Pet. 16-30) that the court of appeals expanded FERC's remedial authority under 16 U.S.C. 824d. Petitioners are incorrect. In fact, the court simply applied the Commission's well-established statutory authority to order appropriate relief, including refunds, when a seller has violated the terms of a tariff. The court's antecedent determination—that a tariff violation occurred in this case—does not conflict with any decision of this Court or any other court of appeals. Nor does the case have the practical significance that petitioners suggest (Pet. 26-30). The court of appeals did not order any particular remedy, but simply remanded to allow FERC to exercise its discretion. The interlocutory posture of the case makes this Court's review inappropriate at this time.

1. Petitioners' arguments rest on the erroneous premise that the court of appeals expanded FERC's statutory authority in holding "that [16 U.S.C. 824d] authorizes FERC to order retroactive refunds" for periods before the refund effective date specified in the FPA. Pet. 16. Contrary to petitioners' assertions, the court of appeals did not contravene the FPA in interpreting the Commission's remedial authority. Indeed, the principal issue before the court of appeals was not the interpretation of the FPA—it is well-established that FERC has statutory authority to order retroactive remedies for tariff and filed-rate violations. The issue before the court of appeals was simply whether such violations occurred during the California energy crisis.

FERC's authority to remedy tariff and filed-rate violations derives from its general "power to perform any and all acts * * * it may find necessary or appropriate to carry out" the FPA. 16 U.S.C. 825h. As the D.C. Circuit has recognized, that provision gives the Commission "discretion to determine the remedy for tariff violations," and those remedies "may include refunds." *Consolidated Edison Co. of N.Y., Inc.* v. *FERC*, 347 F.3d 964, 972 (2003). Indeed, FERC "has a 'general policy of granting full refunds' for overcharges." *Ibid.* (quoting *Town of Concord* v. *FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992)); see *Boston Edison Co.* v. *FERC*, 856 F.2d 361, 369 (1st Cir. 1988) (under Section 825h, FERC "can enforce the terms of a filed rate and order refunds for past violations of one"); *Southern Cal. Edison Co.* v. *FERC*, 805 F.2d 1068, 1070-1072 (D.C. Cir. 1986).[3]

In the Refund Proceeding in 2001, the Commission rejected demands for refunds predating the complaint in that case. FERC recognized that it had authority to "take retroactive action" to remedy tariff violations, but it concluded that "it has not been demonstrated that any conditions or limitations of sellers' market-based rate tariffs have been violated." *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Serv.*, 96 F.E.R.C. ¶ 61,120, at 61,507-61,508 (2001). The Commission's orders in this case adopted that analysis in rejecting California's demands for refunds predating its complaint. Pet. App. 52a-54a & n.55 (citing *San Diego*, 96 F.E.R.C.

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[3] Petitioners acknowledge (Pet. 19 n.33) that FERC has authority under Section 825h "to punish a seller's violation of its own tariff," but they object that "no such violations have been proved here." Petitioners did, however, violate the Commission's reporting requirements, and the court of appeals in turn determined that those requirements "were an integral part" of the tariff. Pet. App. 15a.

at 61,505); Pet. App. 76a & n.25 (citing *San Diego*, 96 F.E.R.C. at 61,507-61,508). The Commission concluded that the reporting violations were essentially "compliance issue[s]" and were not tariff violations (which would implicate the Commission's retroactive remedial authority). Pet. App. 53a, 74a. The Commission distinguished *Washington Water Power Co.*, 83 F.E.R.C. ¶ 61,282 (1998), and *Delmarva Power & Light Co.*, 24 F.E.R.C. ¶ 61,199, opinion modified by 24 F.E.R.C. ¶ 61,380 (1983)—cases in which it had ordered disgorgement of profits—on the ground that those cases involved tariff violations that permitted the Commission to award retroactive refunds. Pet. App. 77a.

The court of appeals disagreed, finding that the post-approval reporting requirement is a critical aspect of the market-based rate tariff itself. Pet. App. 12a-13a; see *id.* at 14a (noting "the integral nature of the reporting requirements to an effective market-based tariff"). Observing that the reporting requirement was subject to "rampant" non-compliance during the California energy crisis, *id.* at 12a, the court of appeals concluded that the Commission in fact possessed remedial authority, like that exercised in *Washington Water Power* and *Delmarva*, to remedy the tariff violations that the court held had occurred. *Id.* at 14a-15a.

Thus, contrary to petitioners' suggestion (Pet. 16-23), the court of appeals did not expand FERC's refund authority under 16 U.S.C. 824d and 824e. Rather, the key difference between the court of appeals' opinion and the Commission's decision below is that the Commission, unlike the court of appeals, did not equate a violation of its after-the-fact reporting requirement to a violation of the tariff. Only in this respect did the court of appeals find the Commission to have broader authority than the

Commission believed it possessed in the circumstances of the present case. The court of appeals determined that the reporting violation was effectively a violation of the market-based tariff, implicating FERC's authority to remediate a tariff violation whenever it occurred, such as that exercised in *Washington Water Power* and *Delmarva*. Pet. App. 14a-15a; see *Public Utils. Comm'n* v. *FERC*, 462 F.3d 1027, 1048-1049 (9th Cir. 2006) (noting that FERC has recognized, in initiating investigative and enforcement proceedings concerning Enron and other energy suppliers, that it possesses full remedial authority to address tariff violations). That antecedent issue, concerning the elements of the tariffs under which petitioners sold electric power during the relevant period, does not warrant review by this Court.

2. Because the court of appeals did not expand FERC's statutory refund authority, the conflict suggested by petitioners is illusory. Petitioners invoke (Pet. 22-23) this Court's decisions applying the filed-rate doctrine. Those cases hold that the Commission may not order retroactive refunds of payments made under a tariff that has been properly filed. See, *e.g.*, *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956). The decision of the court of appeals is consistent with that principle. As explained above, the court simply determined that the sellers had violated the terms of their tariffs. It is undisputed that the Commission has authority to provide redress in that situation.

For the same reason, petitioners err when they suggest (Pet. 24-26) that the decision below conflicts with decisions of other courts of appeals. In particular, the decision of the court of appeals does not "diverge[] from the prevailing rule in the D.C. Circuit." Pet. 25. To the contrary, the D.C. Circuit has recognized—in the very case on which petitioners principally rely—that FERC may, and generally does, grant full refunds for violations of a tariff. See *Consolidated Edison*, 347 F.3d at 972-973. To the extent that the cases cited by petitioners identified statutory limits on FERC's refund authority, they did not address the situation in which a seller has violated a tariff. See, *e.g.*, *Distrigas of Mass. Corp.* v. *FERC*, 737 F.2d 1208, 1221 (1st Cir. 1984) (Breyer, J.) (discussing "payments made under a rate that was lawful at the time of payment"). And petitioners have identified no decision that conflicts with the court of appeals' determination that the sellers in this case, by violating FERC's reporting requirements, effectively violated their market-based tariffs.

3. Petitioners are similarly mistaken in asserting (Pet. 26) that the decision of the court of appeals is "of enormous practical importance." The court of appeals agreed with California only to the extent that it concluded that "FERC improperly concluded that retroactive refunds were not legally available." Pet. App. 18a. It did not require the Commission to order refunds; instead, it remanded to allow the agency to exercise its discretion. *Ibid.* Indeed, the court explicitly stated that the Commission "may elect *not* to exercise its remedial discretion by requiring refunds." Pet. App. 15a (emphasis added).[4]

Petitioners argue (Pet. 27-28) that retroactive refunds will threaten the growth and competitiveness of wholesale power markets, chill future investment, and destabilize wholesale electricity markets. Petitioners may present those arguments on remand, and the Commission may take them into account in exercising its remedial discretion. If petitioners are dissatisfied with the Commission's exercise of its discretion, or if they believe that it has exceeded its statutory authority on remand, they will be able to seek judicial review. See 16 U.S.C. 825*l*(b). At present, however, the interlocutory nature of the refund issue makes any review by this Court premature. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).[5]

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[4] Petitioners assert that the court of appeals has extended the decision below in a subsequent decision regarding FERC's review of long-term contracts for the sale of electricity. Pet. 29 (citing *Public Util. Dist. No. 1* v. *FERC*, 471 F.3d 1053 (9th Cir. 2006)). But in that case, too, the court merely remanded "to allow FERC the opportunity to review these complaints in the first instance." *Id.* at 1057.

4. Although opposing the petition for a writ of certiorari, the State of California has filed a conditional cross-petition for a writ of certiorari (No. 06-1100). The cross-petition seeks review of the court of appeals' holding that the Commission's market-based rate program produced valid filed rates in compliance with the prior notice and filing requirements of the FPA. Cross-Pet. 2-12. As California appears to recognize, that issue does not independently warrant this Court's review. The resolution of the issue by the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, even if this Court

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[5] The practical significance of this case is further limited by the improbability that a situation of the seriousness and magnitude of the California energy crisis will recur. See *Report to Congress* 8 (describing the unusual combination of factors that led to the California energy crisis); *Californians for Renewable Energy, Inc.* v. *California Pub. Utils. Comm'n*, 119 F.E.R.C. ¶ 61,058, 2007 WL 1155627, at *7 para. 30 (Apr. 19, 2007) (noting that "the 2000-2001 energy crisis in the West" was "an unprecedented situation in which numerous adverse events occurred simultaneously"); see also pp. 23-25, *infra*.

were to grant the principal petition, the conditional cross-petition should be denied.

a. FERC's approval of market-based rates fully complied with the FPA. While 16 U.S.C. 824d(a) requires that "[a]ll rates and charges made * * * shall be just and reasonable," the FPA does not dictate, or even mention, any particular ratemaking methodology to be followed. Thus, the statute grants FERC broad discretion as to how the statute's ratemaking mandate will be satisfied. The market-based rate program represents a reasonable exercise of that discretion.

Contrary to California's contention (Cross-Pet. 5), the market-based rate program does not violate the FPA's filing requirement. The FPA requires that every public utility file with FERC "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission," 16 U.S.C. 824d(c), but it explicitly leaves the timing and form of those filings to FERC's discretion. Public utilities must file "schedules showing all rates and charges" under "such rules and regulations as the Commission may prescribe," and "within such time and in such form as the Commission may designate." *Ibid.*[6] Accordingly, as the court of appeals explained, "so long as FERC has approved a tariff within the scope of its FPA authority, it has broad discretion to establish effective reporting requirements for administration of the tariff." Pet. App. 11a.

Nor does the market-based rate program result in utilities filing "no rates at all." Cross-Pet. 10. For the tariff applicable here, the Commission requires sellers to file quarterly reports detailing, for each individual purchase and sale, the names of the parties, a description of the service, the delivery point of the service, the price charged and quantity provided, the contract duration, and any other attribute of the product being purchased or sold that contributed to its market value. Pet. App. 11a, 49a. That reporting requirement provides a means for the Commission and the public to spot pricing trends or discriminatory patterns that might indicate the exercise of market power. *Id.* at 42a.

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[6] The FPA does not define "schedules," leaving that to FERC's discretion as well. FERC has defined "rate schedule" in its regulations at 18 C.F.R. 35.2(b).

California asserts (Cross-Pet. 11-12) that the market-based rate program contravenes 16 U.S.C. 824d(d), which requires that all rates be filed 60 days before service begins, and 16 U.S.C. 824d(e), which permits suspension and investigation of proposed rates before they are charged. But as the court of appeals recognized, "FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with a strict reporting requirement to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." Pet App. 10a-11a. Under the market-based rate regime, the rate change is initiated when an applicant applies for authorization of market-based pricing. At that time, there is an opportunity for a hearing, with the burden of proof on the applicant to show that it lacks, or has adequately mitigated, market power. See generally 18 C.F.R. Pt. 35 (filing requirements and procedures). That investigation fully satisfies 16 U.S.C. 824d(d) and (e). In addition, if an applicant is granted market-based rate authority, then it must file quarterly reports showing transaction-specific data for all transactions. See 18 C.F.R. 35.10b. California asserts (Cross-Pet. 12) that the procedures established by Congress for reviewing the legality of proposed rates "cannot function properly without advance filing." In contrast to California's view that the after-the-fact reports are per se invalid or insufficient, the court of appeals explained that the reporting requirements are "integral to the [market-based rate] tariff" and that they, together with the Commission's initial approval of market-based rate authority, comply with the FPA's requirements. Pet. App. 16a.

b. California suggests that the decision of the court of appeals is inconsistent with cases holding that the FPA requires that a rate filing specify the "rate itself," and not simply provide that rates will be determined by agreement. Cross-Pet. 5 (citing *Electrical Dist. No. 1* v. *FERC*, 774 F.2d 490, 492-493 (D.C. Cir. 1985) (Scalia, J.)). *Electrical District* resolved a "disagreement over what it means to 'fix' a rate within the meaning of 16 U.S.C. 824e(a)"—not Section 824d(c). 774 F.2d at 492. The D.C. Circuit rejected FERC's "policy of making rates effective as of the date of an order [under 16 U.S.C. 824e] setting forth no more than the basic principles pursuant to which the new rates are to be calculated." *Id.* at 493. *Electrical District* holds only that FERC cannot, in a proceeding under Section 824e, "announce some formula and *later* reveal that the formula was to govern from the date of announcement." *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990). It says nothing about whether FERC can establish rules under Section 824d(c) that permit the filing and approval of market-based rate tariffs.

The other court of appeals cases cited by California are equally inapposite. In *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379-380 (D.C. Cir. 1986) (Scalia, J.), the Interstate Commerce Commission approved a tariff provision under which freight forwarders could provide services to shippers at unpublished rates determined by averaging prior charges to those shippers. *Id.* at 377-378. The court found that that provision violated 49 U.S.C. 10761(a) (1982), which required that rates be "contained in a tariff," because the agreed-upon average rates would never be published nor filed with the Commission. 793 F.2d at 380. The court noted that Section 10761(a) expressly prohibited the charging of any rate different from the tariffed rate. See *id.* at 379. Here, in contrast, 16 U.S.C. 824d(c) expressly permits sellers to set rates either by tariff or by contract, and the Commission's market-based rate program requires quarterly filings providing details of all transactions.

Similarly, in *Southwestern Bell Corp.* v. *FCC*, 43 F.3d 1515, 1521 (D.C. Cir. 1995), the FCC "adopt[ed] a policy of permitting nondominant common carriers to file a range of rates as opposed to fixed rates showing a schedule of charges." *Id.* at 1517. The court held that the FCC policy violated 47 U.S.C. 203(a), which requires that every common carrier file "schedules showing all charges." 43 F.3d at 1517. That statute requires a specific list of discernible rates, rather than a filing of a range of possible rates. *Id.* at 1521. Here, FERC's quarterly reports require each seller to list the terms of each transaction individually. See Pet. App. 13a (noting the "transaction-specific" nature of the required filings). The transaction-specific data required in FERC's quarterly reports do not constitute a range of rates similar to that rejected in *Southwestern.*

c. California also errs in arguing (Cross-Pet. 7-10) that the decision below is inconsistent with this Court's decisions in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommuni-*

cations Corp. v. *AT&T Co.*, 512 U.S. 218 (1994). The Commission's interconnected program of ex ante findings of no market power, coupled with post-approval reporting requirements, distinguishes the market-based rate program from those at issue in *Maislin* and *MCI*.

Maislin involved an ICC policy that allowed carriers to charge privately negotiated contract rates that differed from the filed tariff rate, were never disclosed to or reviewed by the ICC, and were not subject to challenge for discrimination. 497 U.S. at 132-133. This Court found that the policy violated the filed-rate doctrine. *Id.* at 127. Here, in contrast, market-based sales are made in accordance with a market-based rate umbrella tariff, approved only after FERC determines, in a publicly-noticed proceeding with opportunity for interested parties to protest, that a seller lacks market power. Pet. App. 10a. In addition, FERC's system requires the quarterly filing of the actual rates charged for individual transactions, allowing both FERC and the public to review rates for reasonableness and lack of undue discrimination. *Id.* at 11a. After market-based rate authority is granted, parties can file complaints, or FERC can institute its own proceeding, to challenge market-based rates as unduly discriminatory or unjust or unreasonable, or to question whether the seller has market power.

California's reliance on *MCI* is similarly misplaced. *MCI* rejected an FCC policy that relieved *all* nondominant carriers of *any* requirement to file any of their rates with the agency. This Court found that such wholesale detariffing for nondominant carriers effectively removed all rate regulation where the FCC found competition to exist. 512 U.S. at 231-232. FERC's market-based rate system, by contrast, requires every seller with market-based rate authority to have on file an umbrella market-rate tariff and to file quarterly reports detailing the specific rates charged for each sale. No detariffing occurs in these circumstances. As the *MCI* Court held, it would not violate the filed-rate doctrine for the FCC to "modify the form, contents, and location of required filings, and [to] defer filing or perhaps even waive it altogether in limited circumstances." *Id.* at 234. That is what FERC did here.

In fact, courts of appeals have recognized that market-based rates are consistent with the requirements of the FPA and cognate statutes. "[W]hen there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result." *Elizabethtown Gas Co.* v. *FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); see *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990); *Louisiana Energy & Power Auth.* v. *FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Cajun Elec. Power Coop., Inc.* v. *FERC*, 28 F.3d 173, 176, 179, 180 (D.C. Cir. 1994). As the court of appeals correctly found, in "a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." Pet. App. 10a (quoting *Tejas*, 908 F.2d at 1004). No court of appeals has held that FERC's approval of a market-based system such as that in California is inconsistent with the FPA's mandates.

d. Since the conduct at issue in the orders here, the Commission has taken additional steps to develop and improve its market monitoring and enforcement mechanisms.[7] These and other actions to promote competitive, transparent, and robust energy markets address the sorts of concerns articulated in California's cross-petition. In addition, the Energy Policy Act of 2005 has given FERC new authority to remedy manipulative behavior by participants in wholesale electricity markets. See Pub. L. No. 109-58, § 315, 119 Stat. 691 (to be codified at 16 U.S.C. 824v (Supp. V 2005)) (authorizing FERC to prohibit "any manipulative or deceptive device or contrivance" by "any entity" in connection with a FERC-jurisdictional transaction); *id.* § 1284, 119 Stat. 980 (to be codified at 16 U.S.C. 825*o* (Supp. V 2005)) (providing for enhanced civil penalties for willful violations of Part II of the FPA).

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[7] See generally *Californians for Renewable Energy, Inc.*, 2007 WL 1155627, at *7 para. 31 (describing steps taken by the Commission "to ensure that there are appropriate market safeguards in place to prevent a repeat of the California 2000-2001 energy crisis"); see also, *e.g.*, *Revised Public Utility Filing Requirements*, 99 F.E.R.C. ¶ 61,107 (Order No. 2001) (requiring electronic filing of quarterly reports providing transaction-specific data on wholesale power sales) (67 Fed. Reg. 31,044 (2002)), decision clarified by 100 F.E.R.C. ¶ 61,074 (2002); *Order Amending Market-Based Rate Tariffs & Authorizations*, 105 F.E.R.C. ¶ 61,218 (2003) (imposing market behavioral rules in all market-based rate tariffs), decision clarified by 107 F.E.R.C. ¶ 61,175 (2004); *Electric Quarterly Reports*, 105 F.E.R.C. ¶ 61,219 (2003) (revoking market-based rate authority for utilities that failed to meet reporting requirements); *Order Revoking Market-Based Rate Authority, Establishing Hearing and Settlement Judge Procedures, and Terminating Section 206 Proceeding*, 113 F.E.R.C. ¶ 61,124 (2005) (same); *AEP Power Marketing, Inc.*, 107 F.E.R.C. ¶ 61,018 (2004) (adopting new interim generation market-power analysis and mitigation policy); *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, 110 F.E.R.C. ¶ 61,097 (2005) (Order No. 652) (amending regulations to establish a reporting obligation for changes in status that apply to public utilities authorized to make sales at market-based rates) (70 Fed. Reg. 8253 (2005)); *Prohibition of Energy Mkt. Manipulation*, 114 F.E.R.C. ¶ 61,047 (2006) (Order No. 670) (amending Commission regulations to implement new Section 222 of the Federal Power Act, prohibiting the employment of manipulative or deceptive devices or contrivances) (71 Fed. Reg. 4244 (2006)). See also *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, 115 F.E.R.C. ¶ 61,210 (2006) (notice of proposed rulemaking to revise current standards for market-based rate sales); *Notice of Proposed Rulemaking*, 118 F.E.R.C. ¶ 61,031 (2007) (proposing revised standards of conduct for electric transmission providers).

Those new statutory provisions and measures instituted by the Commission since the California energy crisis in 2000-2001 also reinforce the conclusion that the remedial issue raised in the principal petition, which arises out of the unique context of that crisis, does not warrant review by this Court, especially at this interlocutory stage of the proceedings.

CONCLUSION

The petition and conditional cross-petition for writs of certiorari should be denied.

Respectfully submitted.

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No. 06-888

IN THE
Supreme Court of the United States

CORAL POWER, L.L.C., ET AL.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. EDMUND G. BROWN, JR., ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CORRECTED
LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Coral Power, L.L.C., AES Placerita, Inc., Portland General Electric Company, Powerex Corp., PPL EnergyPlus, LLC, PPL Montana, LLC, Public Service Company of New Mexico, Puget Sound Energy, Inc., Sempra Energy Solutions LLC (f/k/a Sempra Energy Solutions), Sempra Energy Trading Corp., and Sempra Generation (f/k/a Sempra Energy Resources) were intervenors in the court of appeals proceedings and participated in the agency proceedings.

Respondent People of the State of California ex rel. Bill Lockyer, Attorney General, was the petitioner in the court of appeals proceedings and participated in the agency proceedings. Edmund G. Brown, Jr., has since replaced Bill Lockyer as California's Attorney General.

Respondent Federal Energy Regulatory Commission was the respondent in the court of appeals proceedings.

The following respondents were intervenors in the court of appeals proceedings and participated in the agency proceedings:

AES Delano, Inc. (f/k/a Delano Energy Company Inc.)
Arizona Public Service Co.
Avista Corporation
Avista Energy, Inc.
BP Energy Co.
Cabrillo Power I LLC
Cabrillo Power II LLC
City of Tacoma, Washington
Duke Energy North America, LLC
Duke Energy Trading and Marketing, LLC
Dynegy Power Marketing, Inc.
El Paso Merchant Energy LP
El Segundo Power LLC

Enron Energy Services, Inc.
Enron Power Marketing, Inc.
Long Beach Generation LLC
Mirant Americas Energy Marketing LP
Mirant California, LLC
Mirant Delta, LLC
Mirant Potrero, LLC
Morgan Stanley Capital Group Inc.
Mountainview Power Company
Pacificorp
Pacificorp Power Marketing, Inc.
Pinnacle West Capital Corporation
Public Service Company of Colorado
Reliant Energy Services, Inc.
Riverside Canal Power Company
Strategic Energy LLC
TransAlta Energy Marketing (California) Inc.
TransAlta Energy Marketing (U.S.) Inc.
TransCanada Energy Ltd.

CORPORATE DISCLOSURE STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at pages iv-vi of the petition for a writ of certiorari, and, with the exception of Coral Power, L.L.C.'s revised Statement below, there are no amendments to those Statements.

Coral Power, L.L.C. is owned by Coral Energy Holding, L.P., which is indirectly owned by Shell Oil Company. Shell Oil Company is owned by Royal Dutch Petroleum Company, which in turn is owned by Royal Dutch Shell plc, a publicly traded corporation. Royal Dutch Shell plc has no parent company, and no publicly held company owns 10% or more of its stock.

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The Ninth Circuit created a retroactive refund remedy out of whole cloth, inferred that remedy from powers "implied" under § 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d, and ordered FERC on remand to apply a novel legal standard that no court in the seven-decade history of the FPA has ever imposed. In a report to Congress, FERC described the court's opinion below as an expansion of the Act beyond the limits long-recognized by the Commission. *See* Pet. 27. Now, FERC takes a completely different approach. It largely abandons its defense of the Commission's orders and asserts that the Ninth Circuit's judgment is best understood not as an interpretation of § 205, which the Ninth Circuit cited 10 times, but rather as an application of FPA § 309, 16 U.S.C. § 825h, a provision that was not cited in FERC's or California's briefs below, not mentioned by the Ninth Circuit in its opinion, and not relied on as a basis for relief in California's original complaint. On the question presented – and addressed by the Ninth Circuit – there is an undisputed conflict among the circuits. The efforts by FERC and California to recast the decision below as relying on § 309 and a re-characterization of petitioners' tariffs should not obscure the critical importance of the issue or the circuit conflict. Only this Court can now rein in the Ninth Circuit's expansion of FERC's powers beyond their statutory limits. Left uncorrected, the Ninth Circuit's judgment will foster market uncertainty and ultimately harm consumers by chilling investment in much-needed electricity infrastructure.

I. THE NINTH CIRCUIT CREATED A NEW REFUND POWER UNDER FPA § 205

The Ninth Circuit reached the unprecedented conclusion that FERC has a general power under FPA § 205 to order retroactive refunds for sales at unjust-and-unreasonable rates, *see* Pet. App. 15a-17a – an interpretation that FERC itself has described as "'provid[ing] the Commission with broader authority than [FERC] believed the Act provided.'" Pet. 26-27 (quoting FERC, Report to the United States Congress, *The Commission's Response* *to the California Electricity Crisis and Timeline for Distribution of Refunds* 7 n.12 (Dec. 27, 2005) ("FERC 2005 Report")). Respondents do not defend the lower court's judgment that "[t]o cabin FERC's *section 205* refund authority under the circumstances of this case would be manifestly contrary to the fundamental purpose and structure of the FPA." Pet. App. 17a (emphasis added). Nor do they contest that the same panel of judges subsequently reaffirmed that conclusion, describing this case as holding that "FERC erred as a matter of law in concluding retroactive refunds were not available under § 205." *Public Utils. Comm'n v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006).

Unable to defend the Ninth Circuit's holding on the statutory ground the court articulated, California and FERC offer new theories to rationalize the court's decision. California claims the court held that FERC has authority under FPA § 309 to order refunds because petitioners' filing of aggregated (rather than individualized) transaction data failed to comply with FPA § 205(c). Cal. Opp. 14. FERC also now invokes § 309 as the basis for the Ninth Circuit's opinion, abandoning the arguments it made to the Ninth Circuit in defense of its orders so that it can retain a precedent that greatly inflates its refund authority. But FERC does not join California's argument that petitioners violated § 205(c), instead characterizing the Ninth Circuit as holding that petitioners failed to comply with a provision of their tariffs. FERC Opp. 13-14. Respondents' assertions are unsustainable, and their attempts to divert the Court's focus from the Ninth Circuit's erroneous interpretation of § 205 are unpersuasive.

A. The Ninth Circuit Did Not Rely On FPA § 309

Contrary to respondents' post-hoc rationalizations of the decision below, the Ninth Circuit neither explicitly nor implicitly rested its holding on § 309. Rather, the Ninth Circuit reasoned that FERC must have authority to order retroactive refunds under § 205 because, "if no retroactive refunds were legally available, then the refund mechanism under a market-based tariff would be illusory" and "[p]arties aggrieved by the illegal rate would have no FERC remedy." Pet. App. 15a. The court recognized FERC's position, based on settled principles, that the refund powers in § 206(a) and § 205(e) do not apply here. *See id.* at 18a ("the purgatorial [refund] period contemplated [in § 205(e)] does not exist" and, under § 206, "the only remedies are prospective"). But the Ninth Circuit expressed alarm that "the § 205(e) refund remedy is, practically speaking, eliminated under the scheme as FERC would have us interpret it." *Id.* The court then proclaimed that FERC's "interpretation comports neither with the statutory text nor with the [FPA]'s 'primary purpose' of protecting consumers." *Id.* But, rather than interpreting the statutory language (which it never quoted), the Ninth Circuit asserted that retroactive refunds *must* be available because the "FPA cannot be construed to immunize those who overcharge and manipulate markets in violation of the FPA." *Id.* Thus, the court held that § 205 authorizes "*implied* enforcement mechanisms sufficient to provide *substitute* remedies for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory rates." *Id.* at 16a (emphases added).

Indeed, California embraces the natural reading of the Ninth Circuit's opinion, stating that, "to avoid an interpretation that would cut Section 205(e) out of the scheme entirely, the court held that FERC must provide '*substitute*' procedures and *remedies*." Cal. Opp. 19 n.12 (quoting Pet. App. 16a) (emphases added). California thus acknowledges that the Ninth Circuit implied a new retroactive-refund remedy to "substitute" for the one expressly set forth in § 205(e).[1] It is simply untenable for either FERC or California to contend that the decision below did not do what it expressly did – expand the remedies available under § 205. That unwarranted expansion of § 205 blurs the historical distinctions between § 205 and § 309 in profoundly harmful ways.[2]

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[1] California claims, however, that the particulars of that new substitute remedy are not at issue in this case. Cal. Opp. 18 n.12. But that claim cannot be squared with the Ninth Circuit's opinion, which nowhere suggests that the issue of "substitute remedies" was being left for a future case. On the contrary, the court remanded the case to FERC "to reconsider its remedial options." Pet. App. 18a.

B. The Ninth Circuit Did Not Hold That Petitioners Violated FPA § 205(c)

California recasts the decision below to make it appear defensible by claiming that the Ninth Circuit held that FERC could order refunds because deficiencies in transaction reports meant that petitioners failed to file their rates as required by FPA § 205(c). Cal. Opp. 13-19. California relies heavily on the court's statements that the reporting requirements were "integral" to the tariff and that, when no transaction reports have been filed, "[p]ragmatically, . . . there is no filed tariff in place at all." Pet. App. 15a. But, far from holding that petitioners violated § 205(c), those statements simply emphasized the Ninth Circuit's belief that FERC should have taken petitioners' reporting deficiencies more seriously. *See, e.g., id.* at 12a (referring to "the crucial nature of the transactional reporting").[3]

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[2] It is implausible to suggest – as FERC and California essentially do – that the Ninth Circuit mistook § 205 for § 309 and implicitly rested its decision on the latter section while exclusively citing the former. Section 309 confers a residual authority on FERC to remedy certain discrete, seller-specific violations with equitable remedies, such as a disgorgement of profits when a seller has violated the FPA and that violation has led specifically to ill-gotten gains. *See* Pet. 19 n.33. But it is well established under § 309 that a connection must be shown between the seller-specific violation and the equitable remedy selected by FERC. *See id.* When the limited refund authority in § 205(e) applies – and it indisputably does not here – FERC's analysis in determining that refund is wholly different from the analysis of whether to order one of the limited equitable remedies available under § 309. The Commission awards the difference between the price charged and the just-and-reasonable rate. The just-and-reasonable rate in turn must permit the seller to recover its costs and a reasonable return, and to operate within the market conditions ascertained by the Commission. *See* Pet. 17-18.

[3] Contrary to California's claim (at 17-18), the petition for rehearing that several petitioners filed did not contend that the Ninth Circuit

Even if a complete failure to file transaction reports could be described as "eviscerat[ing] the tariff," *id.* at 15a (and it could not, *see infra* note 4 & p. 7), FERC did not find that petitioners failed to file reports. Rather, FERC concluded that some sellers filed transaction information in aggregated, rather than transaction-specific, form – a breach that FERC acknowledged resulted from "legitimate confusion as to the Commission's expectations," confusion that was "due at least in part to the fact that many sellers filed aggregated data in their quarterly reports for years without having been challenged by any market-participant." Pet. App. 78a. Moreover, the Ninth Circuit never came close to speaking with the kind of clarity that would have been required to overturn the Commission's repeated conclusions that petitioners had in fact complied with § 205(c), although they reported aggregated transaction information.[4]

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had held that petitioners violated § 205(c). Instead, that filing quoted language from the panel's opinion and described the "risk" that plaintiffs might perceive that language as "signal[ing]" that misreported sales lack the protection of the filed rate doctrine. Petition for Panel Rehearing and Suggestion for Rehearing *En Banc* of Indicated Intervenors at 19 (filed Oct. 25, 2004). That filing also argued that the panel had "misapprehend[ed]" the function of the transaction reports, *id.* at 8, but it did not say that the court had held that reporting deficiencies violated § 205(c).

[4] Specifically, FERC explained that "the on-file market-based umbrella tariff (which was the subject of Commission approval) preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so," Pet. App. 43a; that "[p]ower sales made pursuant to a previously accepted market-based rate tariff are, in effect, pre-authorized pursuant to the acceptance for filing of the market-based rate tariff," *id.* at 53a; that market-based rate tariffs fulfill the notice function of § 205(c) because "purchasers know in advance that . . . the rates could 'fluctuate widely and rapidly . . . according to supply and demand.'" *id.* at 45a (quoting Complaint, *California ex rel. Lockyer v. British Columbia Power Exchange Corp.*, Docket No. EL02-71-000 (FERC filed Mar. 20, 2002)); that it was sellers' market-based rate tariffs, "not the quarterly reports," that "constitute[d] the authorization to sell at market-based rates," *id.* at 53a; that California was wrong to assert that deficiencies in transaction reports meant that "no rates were lawfully on file in the first instance," *id.*; that "reporting

Finally, California's attempt (at 7) to paint the reporting deficiencies as serious transgressions that prevented FERC from regulating California's markets is inconsistent with FERC's factual findings that "[t]he Commission as well as all market participants *were aware* that energy prices in California were rising beginning in early 2000" and that "[t]he filing of aggregated data *did not conceal the fact that prices were going up*." Pet. App. 75a-76a (emphases added). Moreover, FERC found that California had failed "to demonstrate specific instances of alleged unjust and unreasonable rates or prohibited schemes – or that they resulted from sellers' non-compliance with the filing requirements." *Id.* at 75a. Because the Ninth Circuit nowhere held that those findings of fact lacked substantial evidence, they are conclusive.[5] Thus, without any finding of a § 205(c) violation or any other support in § 205, the Ninth Circuit nonetheless "agree[d] with California that FERC improperly concluded that retroactive refunds were not legally available." *Id.* at 18a. That judgment creates a conflict with the D.C. Circuit and other circuits warranting this Court's review. *See* Pet. 24-26.

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deficiencies . . . d[id] not invalidate market-based pricing tariffs as lawful filed rates," *id.*; and that transaction reports "simply report the actual transactions that were previously authorized by the Commission, and thus do not constitute new § 205 rate filings," *id.* at 68a n.12.

[5] *See* 16 U.S.C. § 825*l*(b) ("The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."). California misleadingly claims (at 7) that "FERC staff reviewed the sellers' quarterly reports and determined that they provided no useful information." FERC staff in fact stated that "the information contained in the reports [was] not useful for the [staff's] fact-finding investigation" into whether Enron and other entities manipulated short-term prices in the Western wholesale electricity markets. *See* Letter Order to All Jurisdictional Sellers and All Non-jurisdictional Sellers in the West at 1, Docket No. PA02-2-000 (FERC Mar. 5, 2002), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=8306988. That the staff required additional information to conduct its in-depth and wide-ranging fact-finding investigation does not mean that petitioners' transaction reports were not useful for their intended purpose.

C. The Ninth Circuit Did Not Hold That Petitioners Violated Their Tariffs

For its part, FERC struggles to preserve the Ninth Circuit's expansion of its authority under § 205 by claiming that the court merely held that petitioners violated their tariffs by reporting aggregated information. FERC Opp. 14-15. In addition to being contrary to the Ninth Circuit's own repeated citation of § 205 as the authority for its holding (Pet. App. 17a-18a), FERC's interpretation of the Ninth Circuit's opinion loses all plausibility when viewed in light of sellers' filed tariffs. Powerex's then-current market-based rate tariffs, which are typical of petitioners' tariffs during the 2000-2001 period, contain *no* reporting requirement. *See* Add., *infra*, 1a-2a. Rather, during the period at issue here, FERC's reporting requirements were found only in its *orders* approving sellers' market-based rate tariffs. For example, FERC's order approving Powerex's market-based rate tariff provided that, "[c]onsistent with previous Commission decisions, we will require Powerex to file quarterly reports." *British Columbia Power Exchange Corp.*, 80 FERC ¶ 61,343, at 62,141 (1997). Although the order said nothing about the content of those reports, FERC later held that sellers should have been aware of its expectation that they file individualized (not aggregated) transaction information, *see* Pet. App. 48a-50a, even while acknowledging "legitimate confusion as to the Commission's expectations," *id.* at 78a.[6]

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[6] FERC's interpretation of the Ninth Circuit's opinion relies on stray comments that the reporting requirements were an "integral" part of the tariff. FERC Opp. 13 n.3. But other portions of the opinion contradict that reading and correctly state that the reporting requirements were part of "*the authorizations* under § 205." Pet. App. 17a (emphasis added). Even California apparently recognizes that FERC's reporting requirements were contained in the Commission's orders, not the sellers' tariffs. *See* Cal. Opp. 6 ("FERC imposed these reporting requirements on the petitioners and other sellers at the time they sought and obtained market-based rate authority.").

In addition, respondents' interpretations of the Ninth Circuit's opinion are not supported by the court's references to FERC's orders in *Washington Water Power Co.*, 83 FERC ¶ 61,282 (1998), and *Delmarva*

FERC's characterization here of the Ninth Circuit's opinion as resting on petitioners' supposed tariff violations also conflicts with FERC's representation to Congress that "'[t]he Ninth Circuit interpreted *the FPA* to provide [FERC] with broader authority than [FERC] believed *the Act* provided.'" Pet. 27 (quoting FERC 2005 Report at 7 n.12) (emphases added). The strained interpretation of the decision below that FERC advances now to oppose certiorari is most naturally read as an effort to preserve a decision enlarging its statutory powers. That kind of lower-court aggrandizement of an agency's powers, however, is precisely the kind of decision that must be reversed by this Court.

II. THIS COURT'S REVIEW IS REQUIRED NOW

The Ninth Circuit's holding creates enormous uncertainty for sellers in the nation's wholesale energy markets because it provides a means for disgruntled buyers to reopen closed transactions and to bring litigation to recover refunds that until now were uniformly prohibited by the FPA. As *amici* in the industry attest, that uncertainty will harm consumers by discouraging participation in, and thereby reducing the competitiveness and liquidity of, wholesale electricity markets. *See* Brief of Electric Power Supply Ass'n *et al.* at 10-15 (filed Apr. 25, 2007) ("EPSA Br."); *see also* Brief in Opp. to Conditional Cross-Pet. at 20-22, No. 06-1100 (filed May 16, 2007) ("No. 06-1100 Opp.") (explaining the importance of short-term power

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Power & Light Co., 24 FERC ¶ 61,199 (1983) (subsequent history omitted). *See* Pet. App. 14a-15a, 18a. The court understood those cases to hold that FERC has discretion to order retrospective relief, such as disgorgement of profits, when a seller violates "the terms of an accepted rate" (*i.e.*, its tariff) or charges "rates without first seeking approval under FPA § 205." *Id.* at 14a. Neither circumstance is present here. First, the Ninth Circuit did not say (and thus did not hold) that petitioners violated their tariffs, and such a holding would not have made sense in light of the absence of such requirements in the tariff. Second, petitioners did not sell without first seeking FERC's approval because, as the Ninth Circuit recognized, FERC had granted petitioners authority to sell at market-based rates. *See id.* at 4a; *see also supra* note 4; Pet. 19 n.33.

markets); Pet. 27 n.41. Regardless of whether FERC actually orders refunds in this proceeding, the Ninth Circuit's decision confers on FERC a power that it never had before. The potential exercise of that power has had and will continue to have a chilling effect on much-needed power investments. *See* EPSA Br. 12, 14-15.[7] For that reason as well, FERC's contention (at 17) that this case is in an interlocutory posture overlooks the illegitimacy of such a remand proceeding: where the statute's plain text fails to support the novel legal standard adopted by the court below, it would be inefficient to require the parties to litigate remand proceedings before the Commission only to have this Court rule later that the whole exercise was not permitted under the FPA.

Nor should the Court be swayed by FERC's lulling assertion (at 17 n.5) that the California energy crisis was a singular, non-recurring event. History belies that claim. In 1998, prices in the Midwest spot markets skyrocketed from an average of $25 to as high as $7,500 per megawatt-hour; similar price spikes occurred there the next year.[8] As summers grow warmer, demand for energy will rise,[9] risking the same problems that plagued California's markets. Indeed, Illinois recently has filed a complaint under § 205 requesting refunds on transactions executed in September 2006, asserting that the prices for those transactions exceed the "'zone of reasonableness.'" Complaint at

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[7] The destabilizing precedential impact of the decision below was felt when the Ninth Circuit relied on it to strip market-based rate sellers of the fundamental protections of the *Mobile-Sierra* doctrine. *See* Pet. 29-30; EPSA Br. 4, 18-20. Petitions for certiorari (Nos. 06-1454, 06-1457, 06-1462, 06-1468) have been filed challenging those decisions.

[8] *See* FERC Staff, *Report on the Causes of Wholesale Electric Pricing Abnormalities in the Midwest During June 1998*, at vi (Sept. 22, 1998), *available at* http://www.ferc.gov/legal/maj-ord-reg/land-docs/mastback.pdf; 1 Energy Information Administration, U.S. Dep't of Energy, *Electric Power Annual 1999*, at 3 (Aug. 2000), *available at* http://tonto.eia.doe.gov/FTPROOT/electricity/0348991.pdf.

[9] *See* FERC, *2007 Summer Energy Market Assessment* at 10-11 (May 17, 2007), *available at* https://www.ferc.gov/market-oversight/mkt-views/2007/05-17-07.pdf.

4, *Illinois ex rel. Madigan v. Exelon Generation Co.*, Docket No. EL07-47-000 (FERC filed Mar. 16, 2007) (quoting *Public Util. Dist. No. 1 of Snohomish County v. FERC*, 471 F.3d 1053, 1089 (9th Cir. 2006)).

For its part, California asserts (at 21-23) that the Ninth Circuit's decision was issued more than two years ago and, yet, the sky has not fallen. But California overlooks that the Ninth Circuit's mandate has not issued and the Commission has not been required to abide by the Ninth Circuit's misguided decision.[10] California also asserts (at 23-24) that the decision below will *not* affect FERC's resolution of disputes arising from the Western energy crisis because several sellers have recently settled their disputes with California. But such settlements are irrelevant to sellers that are wrongly accused of excessive charges and that choose to defend themselves by standing on their legal rights.[11]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[10] The Ninth Circuit waited 21 months to deny a rehearing petition. *See* Pet. App. 80a-81a. Subsequently, the court issued multiple orders staying, and extending the stay of, its mandate. *See* Order (Aug. 7, 2006) (staying mandate until November 2, 2006); Order (Oct. 23, 2006) (extending stay until March 2, 2007); Order (Feb. 16, 2007) (extending stay until April 29, 2007); Order (Apr. 25, 2007) (extending stay until June 13, 2007).

[11] California also contends that the Ninth Circuit's judgment is supported on the alternative ground, which the Ninth Circuit rejected, that market-based rate tariffs do not comply with the FPA. But the decision below cannot be defended on that basis because accepting that argument would expand the relief California obtained in the Ninth Circuit by permitting it to seek refunds from sellers that provided transaction-specific information in their quarterly reports. *See* Robert L. Stern et al., *Supreme Court Practice* 445-46 (8th ed. 2002) (citing cases). Because there is no conflict on the legality of market-based rate tariffs and that question need not be resolved to decide the question presented here, the Court should deny the cross-petition and await the development of a conflict in the courts of appeals before considering whether to decide that issue. *See* No. 06-1100 Opp. 9-16, 18-19.

Respectfully submitted,

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ER97-4024-000
British Columbia Power Exchange
FERC Electric Rate
Schedule No. 1
Filing Date 7/31/97
Effective Date 8/1/97

EXHIBIT F

BRITISH COLUMBIA POWER EXCHANGE CORPORATION

FERC RATE SCHEDULE NO. 1

1. **Availability**: The British Columbia Power Exchange Corporation ("Powerex") makes electric energy and capacity available under this Rate Schedule to any purchaser for resale.
2. **Applicability**: This Rate Schedule is applicable to all sales of energy or capacity by Powerex to customers located in the United States not otherwise subject to a particular rate schedule of Powerex.
3. **Rates**: All sales shall be made at rates established by agreement between the purchaser and Powerex.
4. **Other Terms And Conditions**: All other terms and conditions shall be established by agreement between the purchaser and Powerex.
5. **Affiliate Sales Prohibited**: No sale may be made by Powerex pursuant to this Rate Schedule to any Powerex affiliate with a franchise service area in the United States.
6. **Effective Date**: This Rate Schedule shall be effective on the date specified by the Federal Energy Regulatory Commission.

Powerex Corp. Original Sheet No. 1
First Revised Rate Schedule No. 1
(Supersedes Original Rate Schedule No. 1)

DOCKET NO ER01-48-000
COMPANY Powerex Corp.
1ST REV FERC ELEC RATE SCH NO. 1
FILING DATE 10/4/00
EFFECTIVE DATE 9/6//00

POWEREX CORP.

FERC RATE SCHEDULE NO. 1

1. **Availability**: Powerex Corp. ("Powerex") makes electric energy and capacity available under this Rate Schedule to any purchaser for resale.

2. **Applicability**: This Rate Schedule is applicable to all sales of energy or capacity by Powerex to customers located in the United States not otherwise subject to a particular rate schedule of Powerex.

3. **Rates**: All sales shall be made at rates established by agreement between the purchaser and Powerex.

4. **Other Terms and Conditions**: All other terms and conditions shall be established by agreement between the purchaser and Powerex.

5. **Affiliate Sales Prohibited**: No sale may be made by Powerex pursuant to this Rate Schedule to any Powerex affiliates with a franchise service area in the United States.

6. **Effective Date**: This Rate Schedule shall be effective on the date specified by the Federal Energy Regulatory Commission.

Issued by: Doug Little, Vice President, Trade & Development
Effective: September 6, 2000
Issued on: October 4, 2000

Filed to comply with Order No. 614, Docket No. RM99-12-000, issued March 31, 2000

Supreme Court, U.S.
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③

No. 06-888

IN THE

Supreme Court of the United States

CORAL POWER, L.L.C., ET AL.,
Petitioners,
v.
PEOPLE OF THE STATE OF CALIFORNIA
EX REL. EDMUND BROWN, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF ELECTRIC POWER SUPPLY ASSOCIATION, INDEPENDENT ENERGY PRODUCERS ASSOCIATION, AND WESTERN POWER TRADING FORUM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

The Electric Power Supply Association ("EPSA") is a national trade association representing competitive electric power suppliers, including independent power producers, merchant generators, and power marketers. EPSA's members include companies that are involved in competitive electric markets, as well as various state and regional groups that represent the competitive power industry in their respective regions of the country. EPSA's members have significant financial investments in electric generation and electricity marketing operations in the United States. EPSA's organizational mission is the promotion of a favorable market environment for the competitive electric industry. EPSA supports the development of legislative and regulatory policies that encourage the development and implementation of a competitive market for electricity. EPSA also seeks to improve public awareness of the competitive electric industry. EPSA's members have a substantial interest in this case. Most of EPSA's members compete in the wholesale markets and those members will be directly impacted by the Ninth Circuit's decision in this case.

The Independent Energy Producers Association ("IEP") is a California non-profit mutual benefit corporation organized under the Non-Profit Mutual Benefit Corporation Law. IEP's specific purposes are to promote the social welfare by furthering the development and utilization of independent energy facilities to improve the ability of people to become more energy self-reliant, to further the national goal of reducing dependence upon imported sources of energy and to encourage supply options which benefit the society economically, socially, and environmentally. IEP members collectively own and operate approximately one third of California's installed generating capacity. IEP members are commercially active in the western wholesale markets, generating and selling electricity products.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

The Western Power Trading Forum ("WPTF") is a California non-profit, mutual benefit corporation. It is a broadly based membership organization dedicated to enhancing competition in Western electric markets in order to reduce the cost of electricity to consumers throughout the region while maintaining the current high level of system reliability. WPTF's actions are focused on supporting development of competitive electricity markets throughout the region and developing uniform operating rules to facilitate transactions among market participants. The membership of WPTF includes energy service providers, scheduling coordinators, generators, energy consultants and public utilities, all of which are active participants in the restructured California electricity markets.

INTRODUCTION

When Congress passed the Federal Power Act ("FPA") in 1935, the supply of the nation's electric power was controlled by a handful of holding companies that owned vertically integrated utilities with monopoly power in their respective markets. Because the wholesale energy markets were dominated by these monopolies, the Federal Power Commission (the predecessor to the Federal Energy Regulatory Commission (the "Commission" or "FERC")) could not rely on competitive forces to produce economically efficient outcomes, and was required to evaluate utilities' costs to determine whether their energy rates were "just and reasonable" as required under § 205(a) of the FPA, 16 U.S.C. § 824d(a). The marketplace for wholesale power has changed dramatically since then, particularly over the last 30 years. Now that many markets have become workably competitive, FERC has been able to eliminate many of the inefficiencies associated with cost-based rate regulation and to rely principally on market forces to produce "just and reasonable" rates. This market-based approach has produced immense benefits for consumers and investors alike, and has advanced the purposes of the FPA by providing an adequate supply of power at reasonable prices, *viz.*, prices that accurately reflect supply and demand.

The Ninth Circuit's decision in this case threatens the continued viability of market-based regulation of this nation's wholesale power industry, to the substantial detriment of consumers, by eliminating the commercial certainty that is crucial to any functioning marketplace. The "well established 'filed rate' doctrine," which bars the Commission from altering a rate retroactively, "provid[es] th[at] necessary predictability." *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) (Scalia, J.). The Ninth Circuit cast that rule aside, declaring that market-based regulation is lawful only when, in retrospect, the Commission finds that sellers have complied to the letter with its technical "post-approval reporting" procedures *and* only insofar as the Commission uses "implied enforcement mechanisms" to provide "substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory rates." Pet. App. 11a, 15a–16a.

For all of the reasons explained in the petition for certiorari, this Court should review the Ninth Circuit's conclusion that FPA § 205 "implied[ly]" authorizes the Commission to order retroactive refunds of privately negotiated rates. That holding conflicts with the plain text of the statute and conflicts starkly with decisions of this Court and other courts of appeals. *Amici* file this brief, however, to emphasize the practical importance of the question presented. By effectively abrogating the filed rate doctrine in the context of market-based rate regulation, the Ninth Circuit has pulled the rug from existing market participants who invested billions of dollars in reasonable reliance on lawful market-based rates. Unless the decision is reversed, moreover, it will gravely undermine confidence in the nation's wholesale electricity markets in the future. Some sellers will respond rationally by insisting on "risk premiums" to reflect the possibility—indeed, high likelihood—of collateral attacks on past transactions by parties with buyers' remorse. Some suppliers may forego market-based rates entirely in favor of antiquated and inefficient cost-based methods of rate regulation that at least will continue to provide a degree of certainty. And investors in the energy sector may simply choose to place their capital elsewhere. Any of these outcomes would profoundly harm consumers and the economy.

This economic disruption will not be confined to the circumstances of this case, where the Commission found that sellers failed to comply with technical post-approval reporting requirements for spot transactions. The Ninth Circuit has since made clear in a pair of decisions issued in December 2006 that in its view no market-based regime can satisfy the FPA absent the Commission's willingness to reach back and retroactively modify market-based rates—including rates negotiated by sellers that unequivocally have no market power. *See Pub. Utils. Dist. No. 1 of Snohomish County v. FERC* ("*PUD*"), 471 F.3d 1053, 1080-81 (9th Cir. 2006); *Pub. Utils. Comm'n of Cal. v. FERC* ("*CPUC*"), 474 F.3d 587 (9th Cir. 2006). *CPUC* and *PUD* build on the faulty analysis in this case and require the Commission to reconsider the justness and reasonableness of freely contracted prices negotiated pursuant to valid market-based rate authority as a prerequisite to protection from later regulatory interference.

By disregarding the fact that Congress encouraged private parties to negotiate rates by contract instead of filing broadly applicable tariffs, the Ninth Circuit's decision has eliminated the predictability that is essential to a competitive energy marketplace. If not reversed, it threatens to erase billions of dollars in consumer welfare that would otherwise be generated by FERC's market-based regulatory system.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION INJECTS MASSIVE UNCERTAINTY INTO THE NATION'S WHOLESALE ENERGY MARKETS, AND WILL INFLICT ENORMOUS HARM ON CONSUMERS

Congress and the Commission have for decades strived to foster the appropriate conditions for competition in our country's wholesale energy markets. Congress has enacted numerous laws designed to "promote[] competition by lowering entry barriers and increasing transmission access," and "'to use the market rather than government regulation wherever possible both to advance energy security goals and to protect consumers.'" Electric Energy Market Competition Task Force, *Report to Congress on Competition in the Wholesale and Retail Markets for Electric Energy Pursuant to Section 1815 of the Energy Policy Act of 2005* at 2, 54 (2007) ("*Report on Competition*") (quoting H.R. Rep. No. 102-474(I), at 33 (1992)).[2] As the FERC Chairman recently observed, "competition in wholesale power markets is national policy," a policy re-embraced by Congress in the Energy Policy Act of 2005, "the third major federal law enacted in the last 25 years to embrace wholesale competition." FERC Chairman Joseph Kelliher, *Opening Remarks at the Competition in Wholesale Power Markets Conference*, FERC Docket No. AD07-7-000

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[2] *Available at* http://www.ferc.gov/legal/maj-ord-reg/fed-sta/ene-pol-act/epact-final-rpt.pdf. The Electric Energy Market Competition Task Force consists of representatives from the Department of Justice, FERC, the Federal Trade Commission, the Department of Energy, and the Rural Utilities Service. *Report on Competition* at 1 & n.3.

(Feb. 27, 2007); *see also 2006 Economic Report of the President* at 256 (Feb. 2006).[3]

Recognizing that "[m]arket-based rates help[] to develop competitive bulk power markets," the Commission authorizes parties to set rates based on prevailing market prices where it has concluded that market discipline will lead to just and reasonable rates. Final Rule, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,545 (May 10, 1996).[4] The Commission authorizes market-based rates, however, only upon a seller's demonstration that it "do[es] not have, or adequately ha[s] mitigated, market power in the generation and transmission of such energy, and cannot erect other barriers to entry by potential competitors." *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) (footnote omitted). As the D.C. Circuit has recognized, FERC's authorization of market-based rates in these circumstances is perfectly consistent with the FPA's mandate because "[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable" within the meaning of FPA § 205. *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

A seller's application to obtain market-based rate authorization is subject to notice and comment, and aggrieved parties can seek judicial review. *See La. Energy*, 141 F.3d at 368-69 (competitor and customer may challenge FERC's grant of market-based rate authority). After they have been granted market-based rate authority, moreover, sellers must provide public notice of any changes to the characteristics on which the Commission relied in granting market-based rate authority, file quarterly reports summarizing the terms of their market-based transactions, and fully update their market power analyses every three years. *See, e.g., Reporting Requirement for Changes in Status For Public Utilities With Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097 at 61,401 (2005).[5] The Commission actively monitors these filings; in response to a complaint challenge or acting *sua sponte* under § 206 of the FPA, it retains the ability to revoke a seller's blanket market-based rate authority.[6]

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[3] *Available at* http://www.gpoaccess.gov/eop/2006/2006_erp.pdf.

[4] Various states, including California, Connecticut, Maine, New Hampshire and Rhode Island, have also sought to improve competition by requiring utilities to divest their generation to independent entities. *Report on Competition* at 42.

Congress's and FERC's initiatives to develop competitive markets have fundamentally changed and dramatically enhanced this nation's energy markets. In sharp contrast to the concentration and vertical integration that historically defined the industry, these reforms have encouraged non-traditional participants, including independent power producers and power marketers[7] to enter the marketplace. As of April 1, 2006, the Commission had granted market-based rate authority to approximately 1170 entities, including 390 independent power marketers, 180 independent power producers, and 30 financial institutions. *See Market-Based Rates for Wholesale Sales of*

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[5] All of the sellers involved in this litigation had to report their transactions every quarter and had to submit all relevant materials to support their market-based rate authorization every three years. *See Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043, 31,054 (May 8, 2002); *Unicom Energy, Inc.*, 91 FERC ¶ 61,305 (2000); *S. Co. Servs., Inc.*, 91 FERC ¶ 61,259 (2000).

[6] FERC, for example, revoked the market-based rate authority of various Enron subsidiaries upon finding that they manipulated the market and failed to notify the Commission of increases in their market shares. *See, e.g., Enron Power Mktg., Inc. & Enron Energy Servs., Inc.*, 103 FERC ¶ 61,343 (2003); *El Paso Elec. Co.*, 108 FERC ¶ 61,071 (2004).

[7] The term "power marketers" generally refers to entities that buy and sell electricity in the wholesale markets but do not themselves own generating facilities.

Electric Energy, Capacity and Ancillary Services, Notice of Proposed Rulemaking, 71 Fed. Reg. 33,102, 33,119 n.128 (proposed June 7, 2006) (to be codified at 18 C.F.R. pt. 35). These new participants have significantly expanded the nation's energy infrastructure by investing heavily in transmission upgrades and generation facilities; in fact, "[b]etween 1996 and 2004, roughly 74 percent of electricity capacity additions were made by nonutility power producers." *Report on Competition* at 35. As of 2004, nonutilities owned approximately forty percent of the nation's electric generation capacity (as compared to only 8 percent in 1993) and accounted for approximately one-third of the electricity generated. *Id.* at 14. During 2004, over $240 billion in wholesale market sales were reported to FERC, one quarter of which were in the continental West (mostly within the Ninth Circuit's jurisdiction).[8]

In recent years, financial institutions such as investment banks and hedge funds have assumed a central role in competitive wholesale electricity markets. For instance, in 2004 alone, financial institutions acquired approximately five percent of the total generating capacity in the United States. *See* FERC, *2004 State of the Markets Report* at 12, 50 (June 2005).[9] And power marketers affiliated with financial institutions, such as Morgan Stanley, Goldman Sachs, and Merrill Lynch, accounted for over 10 percent of total wholesale market sales by the first quarter of 2005.[10]

The development of robust energy trading markets has increased competition and efficiency in the power industry. The burgeoning trade in wholesale energy as a commodity is evidenced in that "more than half of all generated electricity is exchanged on the wholesale market before it is sold to consumers." *2004 Economic Report of the President* at 162 (Feb. 2004).[11] Nationally, on a typical day, thousands of wholesale electric sales transactions are entered into pursuant to market-based rate tariffs and individually negotiated contracts for sales. Now, large regions of the United States, including New England, New York, California, the Midwest, Texas, and the Mid-Atlantic, are served by centralized power exchanges where energy can be bought and sold in or close to real-time at prices reflecting prevailing market conditions. As the Commission has observed, these bulk power markets provide pricing transparency that "can increase the efficiency of the trading process for sellers and buyers and can give clear price signals indicating the best place and time to build new generation." *Report on Competition* at 4. They have also "increased capital available to market participants" and "improved the industry's ability to address credit issues, increased the ability of companies to buy and sell energy, and increased market liquidity." *2004 State of the Markets Report* at 64. Under traditional cost-based regulation, "competitive centralized markets could not exist," because short-term transactions were executed with little notice and could not happen "[w]ithout blanket approval to sell power at market-based rates." Energy Information Admin., Office of Coal, Nuclear, Electric and Alternate Fuels, DOE, *The Changing Structure of the Electric Power Industry 2000: An Update* at 63 (Oct. 2000) ("*DOE Report*").[12]

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[8] *See* Platts, *Power Market Rankings*, *summarized at* http://www.platts.com/Electric%20Power/Resources/News%20Features/powerrank/ (follow "NERC Regions" and "Transaction Values" hyperlinks) (free registration required) (based on transactions analyzed by Platts).

[9] *Available at* http://www.ksg.harvard.edu/hepg/Papers/FERC.State.of.the.Markets.Report.2004.pdf.

[10] *See* Platts, *Power Market Rankings*.

The development of fluid, competitive energy markets and the increased number and diversity of market participants have produced tremendous and very tangible benefits for consumers. Preeminent energy industry analysts estimate that between 1997 and 2005 consumers saved approximately $34 billion relative to the costs if traditional cost-based regulation had continued.[13] These substantial cost savings are not surprising; the entry of independent power generators and marketers fostered by the Commission's market-based rate regulation "has led to highly efficient new capacity coming on line" and "market incentives can lead to highly efficient plant operations." FERC, Notice of Proposed Rulemaking, *Regional Transmission Organizations*, FERC Stats. & Regs. ¶ 32,541 at 33,719 (1999).

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[11] *Available at* http://www.gpoaccess.gov/usbudget/fy05/pdf/2004_erp.pdf.
[12] *Available at* http://tonto.eia.doe.gov/FTPROOT/electricity/056200.pdf.

Commercial certainty is the bedrock of the interdependent web of purchases and sales that occur every hour of every day in real-life wholesale power markets. Based on contractual commitments from buyers, wholesale sellers of electric power make corresponding commitments to buy or generate power. This web of physical and financial commitments may involve building new generation, contracting to buy firm electric supplies from other sellers, contracting for generating fuel, contracting for transmission services, and hedging electricity costs through futures, options, or financial instruments (*e.g.*, derivatives or swaps). The ability of buyers and sellers to enter into these commitments depends entirely on parties' confidence that the deal they agreed to will be the deal going forward and will not be subject to retroactive change.

The Ninth Circuit's decision puts all of those interdependent commitments and efficiency gains at risk by subjecting market-based rate transactions to the potential exercise of retroactive ratemaking authority. Its holding fundamentally undermines the settled expectations of all market participants by departing radically from this Court's longstanding precedents, the decisions of other circuits, and the Commission's own appreciation of the limits of its remedial authority. This Court and every other court to consider the issue has agreed that "Congress withheld from the Commission power to grant reparations." *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 254 (1951); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990) ("The Act's limited provision for refunds reflects a congressional determination that parties in the industry need to be able to rely on the finality of approved rates, and that this interest outweighs the value of being able to correct for decisions that in hindsight may appear unsound.").

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[13] *See* Cambridge Energy Research Associates ("CERA"), *Beyond the Crossroads: The Future Direction of Power Industry Restructuring* (Sept. 30, 2005), *summarized at* http://cera.ecnext.com/coms2/summary_0236-681_ITM; CERA, *California Power Crisis Aftershock: The Potential Modification of Western Power Contracts* (Apr. 2007) ("*Power Crisis Aftershock*"), *available at* http://www2.cera.com/westernpowercontracts/; *see also 1999 Economic Report of the President* at 216 (Feb. 1999), *available at* http://www.gpoaccess.gov/usbudget/fy00/pdf/1999_erp.pdf ("In a $212 billion industry, even small efficiency gains from competition can have large benefits.").

In other contexts, this Court has found that the filed rate doctrine bars retroactive modification of rates even if intentional wrongs would be left without redress. *See, e.g., AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998) ("[E]ven if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff."). It has long been understood that the filed rate applies regardless of "the culpability of the defendant's conduct or the possibility of inequitable results." *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998).[14] The Ninth Circuit has rejected that understanding in the context of market-based rates and in doing so has undermined the competitive market for electric power and supporting capital markets.

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[14] *See also Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 132 n.12 (1990) ("[The] risk of intentional misconduct ... has always existed and has never been considered sufficient to justify a less stringent interpretation of" the filed rate doctrine.).

If not corrected by this Court, the Ninth Circuit's atextual reading of FPA § 205 to provide the Commission retroactive ratemaking authority for market-based rate transactions will discourage participation in these transactions and jeopardize the health and existence of regional power exchanges. As FERC has recognized, "[t]he certainty and stability which stems from contract performance and enforcement is essential to an orderly bulk power market. If the integrity of contracts is undermined, business would be transacted without legally enforceable assurances and we believe that the market, the industry and ultimately the consumer would suffer." *Pub. Serv. Co. of N.M.*, 43 FERC ¶ 61,469 at 62,153 (1988), *aff'd*, *San Diego Gas & Elec. Co. v. FERC*, 904 F.2d 727, 730 (D.C. Cir. 1990).

Under the Ninth Circuit's holding, individual and institutional investors in the power industry will be unable reliably to quantify the risk that FERC will retroactively change the terms of market-based transactions. At a minimum, market-based sellers will have to offset this regulatory uncertainty by building a "significant risk premium" into every transaction, increasing the cost of power to consumers. *See, e.g., Notice of Proposed Policy Statement*, 100 FERC ¶ 61,145 at 61,545 (2002) (Brownell and Breathitt, Comm'rs, concurring). And power markets that no longer produce reliable price signals will misallocate resources and starve investment in much needed energy infrastructure.

Because of the Ninth Circuit's adoption of retroactive ratemaking for market-based rate transactions, market-based rate sellers will now be disadvantaged when compared with cost-based rate sellers who labor under burdensome and inefficient regulation but nevertheless remain assured that their transactions are immune from retroactive refunds. If the Ninth Circuit's decision is upheld, sellers may seek the regulatory certainty that cost-based regulation provides, even with all of the attendant "procedural delays in achieving tariff approvals and changes" that are endemic to centralized economic planning. *Promoting Wholesale Competition*, 61 Fed. Reg. at 21,545.

The power industry is projected to require new capital investment of almost $900 billion over the next 15 years, which is more capital than the net plant value in place today; approximately $400 billion of this projected need will be for new power plants and environmental retrofits (excluding carbon dioxide control costs) for existing power plants.[15] Developers of power plants and other essential energy infrastructure have to compete for highly mobile capital with entities in other industries that face little or no risk of regulatory intervention. As observed in the *Report on Competition*, "[i]n competitive markets, project funding is based on anticipated market-based projections of costs, revenues and relevant risk factors. The ability to obtain funding is impacted by the degree to which these projections compare with projected risks and returns for other investment opportunities." *Report on Competition* at 78; *see also Gulf State Utils. Co. v. FPC*, 411 U.S. 747, 769 (1973) ("Utility financing normally is accomplished through competitive bidding participated in by a relatively small number of national investment firms which specialize in the purchase from issuers and the wholesaling of utility securities. The market is highly competitive and is particularly sensitive to uncertainties."). As highlighted recently by a preeminent energy industry analyst and advisor, "[s]hortage of capital and interest rates are not the problem. Uncertainty is the problem."[16] By undermining the commercial certainty of market-based rate transactions, the Ninth Circuit harms the development of markets because "[c]ompetitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty." *Pub. Utils.*

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[15] *CERA*, *Power Crisis Aftershock*, at Key Implications, 15–16.

[16] Lawrence Makovich, CERA, *CERA Forecasts $800 Billion in Power Capex over 15 Years*, Electric Power Daily, Feb. 16, 2007, at 10.

Comm'n of Cal. v. Sellers of Long Term Contracts to the Cal. Dep't of Water Res., 99 FERC ¶ 61,087 at 61,383 (2002).

The Ninth Circuit's decision unquestionably will invite complaints from buyers seeking to escape ongoing transactions as well as demands for retroactive remedies from transactions that have closed. The Ninth Circuit's decision obviously opens the door to retroactive challenges by every disgruntled buyer who purchased energy from a seller whose periodic transactional reports were not in the precise format the Commission required, even though the Commission itself believes that those filing deficiencies "do not invalidate market-based pricing tariffs as lawful filed rates." Pet. App. 74a.[17] But even where compliance is not an issue, the Ninth Circuit's decision encourages a flurry of litigation challenging market-based rate transactions. For example, the State of Illinois recently filed a complaint at FERC pursuant to FPA §§ 205, 206 and 222, alleging that the Ninth Circuit's decisions in this case and in *CPUC* and *PUD* require FERC, at the State's behest, to modify or abrogate billions of dollars in wholesale power contracts.[18]

And this is only the tip of the iceberg. The Ninth Circuit declared broadly that the FPA "cannot be construed to immunize those who overcharge and manipulate markets," Pet. App. 18a, and held that "the power to order retroactive refunds," at least for "egregious" behavior, is "inherent in FERC's authority to approve a market-based tariff in the first place." *Id.* at 15a. This latter holding will invite charges of market manipulation and dysfunction and demands for retroactive relief from every buyer who now or in the future comes to regret having purchased when supplies are tight and prices relatively high and volatile—precisely when society most needs suppliers entering and transacting in the market.

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[17] FERC also noted in its Order on Rehearing that there "appears to have been some legitimate confusion as to the Commission's expectations" about the reporting requirements because sellers had provided aggregate sales data "for years without having been challenged by any market participant." Pet. App. 78a.

[18] *Complaint by the People of the State of Illinois ex rel. Lisa Madigan*, FERC Docket No. EL07-47-000 (filed Mar. 15, 2007).

Contrary to the Ninth Circuit's view, this is manifestly bad news for the American consumer. The Commission recognized in a separate proceeding involving transactions in the Pacific Northwest that "refunds would have a negative impact on the ... market" and "would cause a loss of confidence ..., have a chilling effect on trading, cause costs to consumers to increase as market participants demand additional risk premiums and additional security for their transactions, create a hesitancy to conduct business in times of scarcity, and discourage investment in needed infrastructure." *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement*, 103 FERC ¶ 61,348 at 62,368–69 (2003). The same is true here. The Ninth Circuit's holding gravely undermines the FPA's purpose "to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976). The dramatically increased risk of regulatory intervention in market-based rate transactions resulting from the Ninth Circuit's decisions in this case and *PUD* and *CPUC* is likely to cost consumers tens of billions of dollars over the next few decades because of risk-adjusted increases in the capital costs of power suppliers.[19]

II. THE NINTH CIRCUIT'S FAULTY REASONING IN THIS CASE THREATENS FURTHER ECONOMIC INSTABILITY

Although the Ninth Circuit purported to uphold FERC's ability to adopt a market-based approach to rate regulation, it imposed conditions on FERC's exercise of its discretion that make market-based rate regulation unworkable. The Ninth Circuit arrived at this result by badly misconstruing this Court's decisions in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), both of which involved an entirely different sort of regulatory scheme than the FPA and the Natural Gas Act ("NGA"). In *Maislin* and *MCI*, this Court held that adherence to the tariffing scheme is "'utterly central'" to the administration of common carrier obligations set forth in the Interstate Commerce Act ("ICA") and the Communications Act;[20] therefore, the Court rejected agency rules substituting a market-based approach for the requirement that entities adhere strictly to published tariff rates.

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[19] *See* CERA, *Power Crisis Aftershock* at 20–22.

Unlike the ICA and the Communications Act, the FPA does not mandate a *common carrier*, tariff-based regulatory scheme. To the contrary, the FPA (like the NGA) implements a *contract carrier* form of rate regulation under which parties may negotiate rates with particular customers that may be dramatically different from one customer to the next, and those rates are protected from after-the-fact modification except in extraordinary circumstances of unequivocal public necessity. As this Court has long recognized, the ability of parties to negotiate rates by contract stands the FPA and the NGA "in marked contrast to the [ICA], which in effect precludes private rate agreements." *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1956). By "depart[ing] from the scheme of purely tariff-based regulation and acknowledg[ing] that contracts between commercial buyers and sellers could be used in rate setting," Congress embraced the notion that parties could be expected to reach the "just and reasonable" rate as between themselves, without the same heavy-handed regulation imposed under common carrier statutes. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 479 (2002).

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[20] *See Maislin Indus.*, 497 U.S. at 134–35; *MCI Telecomms.*, 512 U.S. at 234 ("For better or worse, the Act establishes a rate-regulation, filed-tariff system for common-carrier communications, and the Commission's desire 'to "increase competition" cannot provide [it] authority to alter the well-established statutory filed rate requirements.'") (quoting *Maislin Indus.*, 497 U.S. at 135) (alteration in original).

Because the Ninth Circuit mistook the FPA for a *common carrier* regulatory scheme, it held that FERC's market-based scheme would fail to comply with this Court's holdings in *Maislin* and *MCI* unless FERC coupled market-based regulation with "implied enforcement mechanisms" that enable the Commission to order retroactive refunds. The court reasoned that "the power to order retroactive refunds ... is inherent in FERC's authority to approve a market-based tariff in the first instance." Pet. App. 15a. Otherwise, "there is no filed tariff in place at all." *Id.* That analysis cannot be squared with the text of the FPA. Although the FPA delegates to FERC considerable latitude in deciding how to regulate rates for wholesale electricity, "Congress withheld from [FERC] power to grant reparations" for rates that have already gone into effect. *Montana-Dakota Utils.*, 341 U.S. at 254; *see* Br. for Pet'r at 19–22 (discussing rejected version of FPA that would have given FERC authority to make retroactive rate adjustments). To be sure, Congress provided limited exceptions in §§ 205(e) and 206(b) "in order to accommodate the realities of administrative delay," *E. Tenn. Natural Gas Co. v. FERC*, 863 F.2d 932, 942 (D.C. Cir. 1988), but those provisions cannot be read to support the Ninth Circuit's expansive holding that FERC retains "inherent" authority to disregard the filed rate doctrine. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (abrogation of the filed rate doctrine "must come from Congress, rather than from this Court").

The Ninth Circuit's flawed analysis of the FPA's statutory scheme, and of § 205 in particular, will have disastrous consequences extending far beyond the confines of this case. In fact, some of these consequences already came to fruition in *CPUC* and *PUD*, a pair of decisions the Ninth Circuit issued in December 2006.[21] Building on the faulty analytical foundation that it created in this case, the Ninth Circuit held that the FPA requires FERC to "implement[] and use[] an effective oversight mechanism *after* the market-based rate authorization is initially granted" and to modify any rates that the Commission concludes, in hindsight, are not "just and reasonable." *PUD*, 471 F.3d at 1081. In so holding, the Ninth Circuit effectively threw out another bedrock principle under the FPA—that freely contracted rates may not be disturbed unless required by the greater public interest.

In *CPUC* and *PUD*, several purchasers secured long-term contracts that protected them from the volatility in energy prices during the Western Energy Crisis. Those purchasers or related third parties later came to second-guess the providence of these bargains and asked the Commission to permit them to abrogate or modify these contracts under § 206 of the FPA. FERC rejected their claims, applying longstanding precedent of this Court that requires enforcement of contracts except in "circumstances of unequivocal public necessity." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) (citing *Mobile*, 350 U.S. 332). But the Ninth Circuit vacated FERC's order based on its decision in this case and held that contracts entered pursuant to FERC's market-based approach are not entitled to the protection traditionally afforded to privately negotiated arrangements because FERC failed to provide sufficient regulatory oversight to ensure that the contracted rates were just and reasonable. *PUD*, 471 F.3d at 1082. As in this case, the Ninth Circuit accepted that FERC may take a market-based approach to evaluating the justness and reasonableness of rates, but it held that FERC must be able to consider "sudden market changes" and protect "purchasers victimized by the abuses of sellers or dysfunctional market conditions that FERC itself only notices in hindsight." *Id.* at 1085. It concluded that FERC abdicated its statutory responsibility by giving deference to voluntary private agreements and limiting its review of such contracts to public interest concerns. *Id.*

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[21] Several parties intend to file petitions for certiorari in the *CPUC* and *PUD* cases, which currently are due May 3, 2007. Because they involve similar missteps by the Ninth Circuit, this Court may find it beneficial to consider those petitions together with this case.

The regulatory review now required by the Ninth Circuit is untenable in a market environment. The competitive market cannot thrive under constant threat of *post hoc* challenges and retroactive refunds. Market participants must be able to rely on the commercial certainty of their market-based transactions after they have been lawfully entered pursuant to FERC's market-based regulatory framework, both with respect to spot-market transactions and long-term contracts. Subjecting market-based transactions to retroactive remedies destroys the contract certainty that this Court and FERC have recognized is essential to the functioning of markets generally, and to healthy energy markets in particular. *See infra* at 10–12; *see also Mobile*, 350 U.S. at 344 ("[T]he stability of supply arrangements ... is essential to the health of the natural gas industry."); *Report on Competition* at 76 ("[L]ong-term contracts [are] a critical prerequisite in obtaining financing for new generators" but the "ability to arrange long-term contracts is inhibited by ... the unpredictability of state and federal regulation."). And the Ninth Circuit's decisions nullify many of the efficiency gains produced under FERC's market-based regulations, because market participants will no longer be able to react quickly to market opportunities. Under the Ninth Circuit's decisions, there is simply nothing a seller can do to insulate its market-based transactions from the risk of future modification or abrogation except to seek FERC's blessing of *every* transaction before it takes effect.[22]

Congress did not overlook the importance of contract stability in enacting the FPA; it built that tenet into the structure of the Act by deliberately withholding reparations as an available remedy for after-the-fact rate challenges. *See Montana-Dakota Utils. Co.*, 341 U.S. at 254. The Ninth Circuit acknowledged that the statute does not make retroactive remedies expressly available, but the court nevertheless concluded that they must be implied as "substitute remedies" to "create a 'symmetrical and coherent regulatory scheme.'" Pet. App. 16a (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Contrary to the Ninth Circuit's holding, while Congress delegated to FERC the broad authority to establish a regulatory framework that will protect consumer interests, it clearly withheld the power to order retroactive remedies. As a practical matter, the Ninth Circuit's decision impermissibly shackles FERC to antiquated cost-based regulatory methods that Congress did not require, and at the same time purports to give FERC remedial authority that Congress specifically prohibited.

CONCLUSION

For all these reasons, and those set forth by petitioner, the petition for certiorari should be granted.

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[22] In *CPUC*, the Ninth Circuit suggested that contracts may be subjected to plenary *post hoc* review even where a seller submits contracts for prior review. The Court held that a contract that had been filed with and accepted by the Commission was not necessarily entitled to *Mobile-Sierra* protection because the Commission's review could not have considered information that was unknown to any party (including the buyer and seller under the contract) at the time of filing. *CPUC*, 474 F.3d at 595 ("At the time Dynegy filed its contract, the full scale of spot market manipulation and forward market dysfunction was not nearly as fully known as it is today.").

Respectfully submitted,

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